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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1921-1922

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES
OF THE
SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

“ “ JOHN JAMES MACLAREN, J.A.

“ “ JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

“ “ WILLIAM NASSAU FERGUSON, J.A.

Second Divisional Court.

(1921).

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P.

“ “ WILLIAM RENWICK RIDDELL, J.

“ “ FRANCIS ROBERT LATCHFORD, J.

“ “ WILLIAM EDWARD MIDDLETON, J.

“ “ HAUGHTON LENNOX, J.

(1922).

THE HON. SIR WILLIAM MULOCK, K.C.M.G., C.J.Ex.

“ “ ROBERT FRANKLIN SUTHERLAND, J.*

“ “ HUGH THOMAS KELLY, J.

“ “ CORNELIUS ARTHUR MASTEN, J.

“ “ HUGH EDWARD ROSE, J.

HIGH COURT DIVISION.

(In addition to the Judges in the Second Divisional Courts.)

“ “ WILLIAM ALEXANDER LOGIE, J.

“ “ JOHN FOSBERY ORDE, J.

“ “ HERBERT McDONALD MOWAT, J.

“ “ ROBERT GRANT FISHER, J.

*Mr. Justice Sutherland died on the 23rd May, 1922.

MEMORANDA.

APPOINTMENTS TO THE BENCH.

On the 7th October, 1922, ROBERT FISHER, of the Town of Cornwall, in the Province of Ontario, Esquire, one of His Majesty's Counsel learned in the law for the said Province, was appointed a Judge of the Supreme Court of Ontario and a member of the High Court Division of the Said Court and *ex officio* a member of the Appellate Division of the said Court.

CALL TO THE BAR.

14th September, 1922.

Wilfrid George Bowles, Norman Lee Matthews, Rodolphe Danis, Lorne Raeburn Cumming, John Harper Schofield, Aubrey Dyson Purcell, Marian Loretta James, Salter Adrian Hayden, Arthur Clayton Newman, Daniel Maclean, John Emeric Stuart Taylor, Jean Noel Desmarais.

19th October, 1922.

William Woodworth Crow, Walter Herman Shinnich, Douglas Derwood Gross, Frederick George McBrien, Donald John McFarlane, William Edward Spencer, Thomas Martin Mungovan, Osmond Francis Howe, Joseph Denny, Adrian Ilderim Revelle, John Clifford Reynolds, Samuel Lepofsky, Abraham Greenbaum, Meyer Rotstein, Charles Robert Bastedo, Morton Moore Keachie, William Joseph Arthur Fair, Walter Woods McKeown.

18th January, 1923.

Clifford Kenneth Case, Raoul Mercier, Matthew Joseph Murphy, Ross Smith Riddell, Florence Adell Thompson, John Reiner Boys, Hugh Fairbairn Brown, George Edward Brennan, Florence Marie Daley, Frederick Cawthorne, Charles Gordon Longman, Jean Rene Lorenzo Lafleur, Osgoode Howard McVean, John B. Woods.

18th January, 1923.

Anase Seguin, Walter Daniel Burns, Thomas Delany, Albert Oscar Llewellyn Burnese, Wallace Gladwin Angus, Thomas Harold Beament, James Walton Stevenson.

ERRATA.

Page 82, 21st line from top, for "*Moulton*" read "*Molton*."

Page 83, 5th line from top, for "*Baxter v. Matthews* (1872), L.R. 8 Ex. 134," read "*Matthews v. Baxter* (1873), L.R. 8 Ex. 132."

Pages 130, 131, 134, where *Tinline v. White Cross Insurance Co.* is cited, add a reference to [1921] 3 K.B. 327, where the case is reported.

Page 131, 18th line from top, for "135" read "139."

Page 145, 3rd line from top, for "227" read "277."

Page 187, 11th line from bottom, for "[1915] A.C. 1" read "1913 S.C. 549."

Page 221, 3rd line from bottom, for "36 B.N.S." read "3 C.B.N.S."

Page 226, 12th and 13th lines from bottom, and p. 227, 18th line from bottom, for "2 C.P.D." read "4 C.P.D."

Page 227, 6th line from bottom, for "1864" read "1846."

Page 249, 22nd line from top, for "12 D.L.R. 71" read "14 D.L.R. 17."

Page 402, 11th line from bottom, for "*Rex*" read "*Regina*."

Page 430, 3rd line from bottom, for "590" read "599."

Page 554, 2nd line from bottom, for "35 Beav. 28" read "35 Beav. 281."

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SUPREME COURT OF ONTARIO
(APPELLATE AND HIGH COURT DIVISIONS).

[IN CHAMBERS.]

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July 13.

★
REX V. BARRY.

Ontario Temperance Act—Magistrate's Order for Forfeiture of Intoxicating Liquor Seized in Transit under sec. 70—Finding that Liquor Intended to be Sold or Kept for Sale in Violation of Act—Prima Facie Case—Consignment in Fictitious Name and Concealment in Car—Sec. 70 (9)—Evidence—Shipment to Foreign Country—Onus—No Reasonable Evidence to Support Order—Violation of Laws of Foreign Country.

Intoxicating liquor shipped by railway from Montreal was seized, in pursuance of sec. 70 of the Ontario Temperance Act, at a railway station in Toronto. The liquor, in a car, was so covered or concealed as probably to render discovery of the nature of the vessel in which it was contained more difficult, and it was consigned in a fictitious name. The shipping documents shewed a shipment from Montreal to Toronto and a reshipment from Toronto to Cleveland; and no doubt was cast by the oral evidence upon their correctness. A police magistrate adjudged that the liquor was intended to be sold or kept for sale in contravention of the Act, and declared it forfeited:—

Held, that, although a *prima facie* case was made under sub-sec. 9 of sec. 70, the fact that the onus was upon one side or the other made no difference, because, upon the whole evidence, reasonable men could not have come to the conclusion to which the magistrate had given effect; and, there being no reasonable evidence to support the magistrate's order, it should be quashed.

Rex v. Lemaire (1920), 48 O.L.R. 475, and *Rex v. Mooney* (1921), 49 O.L.R. 274, applied and followed.

If the proposed method of conveying the liquor into the United States was in violation of the laws of that country, the forfeiture was not thereby justified.

MOTION by the defendant to quash an order made by a magistrate directing the forfeiture of a quantity of intoxicating liquor seized in transit.

Section 70 of the Ontario Temperance Act, 6 Geo. V. ch. 50, as amended by 7 Geo. V. ch. 50, sec. 26, provides:—

(1) Where an inspector . . . or officer finds liquor in transit or in course of delivery upon the premises of any railway company, or at any wharf, railway station . . . or other place, and believes that such liquor is to be sold or kept for sale or

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otherwise in contravention of this Act, he may forthwith seize and remove the same together with the package or packages in which such liquor is contained.

(3) Where liquor has been seized under such section 1 . . . the person seizing the same shall give information under oath before a Justice of the Peace, who shall thereupon issue his summons directed to the shipper, consignee or owner of the liquor, if known, calling on him to appear at a time and place named in the summons, and shew cause why the liquor should not be destroyed or otherwise dealt with as provided by this Act.

(9) If it appears to the Justice that such liquor or any part thereof was consigned to some person in a fictitious name or was shipped as other goods, or was covered and concealed in such a manner as would probably render discovery of the nature of the contents of the vessel . . . in which the same was contained more difficult, it shall be *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of this Act.

The motion was heard by KELLY, J., in Chambers.

James Haverson, K.C., and R. H. Greer, for the defendant.

F. P. Brennan, for the magistrate.

July 13. KELLY, J.:—This application is for an order “quashing or setting aside” an order made by the Senior Police Magistrate for the City of Toronto whereby he adjudged that a quantity of liquor in transit seized in pursuance of sec. 70 of the Ontario Temperance Act, on the 28th December, 1920, at Parkdale station, Toronto, of which the Rideau Lumber Company appeared to be the consignee or owner, was intended to be sold or kept for sale in contravention of the Act, and whereby he declared the said liquor and the vessels in which the same was kept forfeited “to His Majesty to be dealt with in such manner as the Minister may direct.”

It was admitted by counsel for Barry, the claimant, that this liquor was consigned in a fictitious name, and that it was so covered or concealed as probably to render discovery of the nature of the contents of the car more difficult, thus creating a situation within the provisions of sub-sec. 9 of sec. 70, affording *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of the Act.

The evidence of Barry, because of the deceit he practised in so shipping the liquor, was discredited by the magistrate; if

that had been the only evidence on his behalf, it and the admissions made by his counsel would conclusively have warranted the magistrate's finding and order. But the magistrate, though most sweeping in his denunciation of Barry's evidence, clearly has not taken into account the evidence supplied by the bills of lading and other documents, which not only speak for themselves but are not contradicted in any essential detail, and corroborate vital parts of Barry's evidence. Nor has he given consideration to the important evidence of the witness McKeown, the chief billing clerk of the Canadian Pacific Railway Company, whom he said he believed. Part of McKeown's evidence is—and I refer to it now only because the magistrate believed him, and the uncontradicted evidence of the documents is to the same effect—that the car and its contents were being shipped to Cleveland. The evidence of its progress to Toronto is that it was shipped from Mile End, at or near Montreal, on the 24th December, and was seized in Toronto on the 28th December, Christmas Day and Sunday having intervened between the date of shipment and the date of seizure; so that, after its arrival in Toronto, there was little delay in arranging for its re-shipment out of the Province. The officer who made the seizure—the only witness called by the prosecution—has not sworn to any knowledge he had of its destination out of Toronto or of what disposal was to be made of it, except that, on inquiry, he learned that it was to be reshipped to Cleveland. So that *even* the evidence for the prosecution contains a denial of the *prima facie* evidence arising from the use of the fictitious name and the concealment of the liquor in the car.

The documents in evidence speak only of a shipping in from Montreal and a reshipment from Toronto to Cleveland, and no witness has cast doubt on their correctness. If it were possible to find in other parts of the evidence anything to justify the discredit cast by the magistrate upon Barry's evidence, one would hesitate to disturb the order appealed against. The other evidence, however, supports rather than contradicts it.

To arrive at a conclusion as to the proper disposition of this application, having regard to the record of the evidence and the proceedings before the magistrate, it is unnecessary to go further than follow the declaration in *Rex v. Lemaire* (1920), 48 O.L.R. 475, 57 D.L.R. 631, that the fact that the onus may have been upon one side or the other cannot make any difference, if, upon the whole evidence, reasonable men could not have come to the conclusion to which the magistrate has given effect; or for the further statement of the intention of the Legislature in framing and passing sec. 102 of the Ontario Temperance Act, that the ordinary rule as to quashing convictions should prevail—that they should be set aside when there is no reasonable evidence to

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support them. *Rex v. Mooney* (1921), 49 O.L.R. 274, explains the meaning and effect of sec. 88 of the Act, which applies to *prosecutions* of persons charged as there mentioned. That section is not to be invoked in cases which arise solely from seizure under sec. 70, which is concerned only with seizure and forfeiture. Sub-section 9 of that section applies only to cases so arising under that section. That which constitutes *prima facie* evidence under sub-sec. 9 cannot be, and is not, more rigid in its conclusiveness than the evidence of the same character mentioned in sec. 88. The remarks of Mr. Justice Middleton in *Rex v. Mooney*, as to the effect of the latter in cases in appeal must apply as well to sec. 70, sub-sec. 9.

Leaving out of consideration altogether Barry's evidence, except where it is in accordance with or corroborated by other evidence which the magistrate has accepted, I cannot conceive it possible for reasonable men to come to a conclusion adverse to the claimant's claim. For the reasons indicated, the motion should succeed.

If further support were needed for this conclusion, there are additional circumstances in the case which should not be overlooked. The record of the proceedings at the hearing before the magistrate shews that before any witness had given evidence the magistrate entertained a strong belief respecting the ownership or want of ownership of the liquor, and at other times expressed opinions outside of the evidence which excited the alarm of the prosecuting counsel, who evidently appreciated the effect of this upon the merits of the decision. Had there been a more deliberate and calmer consideration of the evidence, vital parts of it would not have been disregarded, and there would not have been ground for complaint that stubborn adherence, against protest, to opinions formed without evidence, or not supported by reasonable evidence, prevented a proper conclusion being reached.

Further, if Barry's proposed method of conveying the liquor into the United States was in violation of the laws of that country—such was suggested during the hearing and it seemed to have impressed the magistrate—that had nothing to do with the merits of the case. We are not here administering the laws of that country or imposing penalties or restrictions for infractions or attempted infractions of foreign laws.

The application is granted without costs, but with protection to the magistrate.

[The order of KELLY, J., was reversed by the First Divisional Court of the Appellate Division on the 27th December, 1921. See 21 O.W.N. 245. The reasons of the Divisional Court will be reported in due course.]

[IN BANKRUPTCY.]

1921.

July 14.

RE WEBB.

Bankruptcy—Assignment by "Insolvent Person" to Creditor of Book-debt within 3 Months Preceding Authorised Assignment—Preference—Onus—Pressure—Bona Fides—Knowledge of Insolvent Condition—Bankruptcy Act, secs. 2 (t), (dd), 30, 31.

The debtor, having assigned a book-debt to a creditor on the 6th November, 1920, made an authorised assignment under the Bankruptcy Act on the 8th December, 1920. Upon motion by the trustee to set aside as preferential the assignment of the book-debt:—

Held, that, as the book-debt assigned was one due at the date of the assignment from a specified debtor, the assignment came within the proviso at the end of sub-sec. 1 of sec. 30 of the Act, and was not void under that section.

If the assignment was void, it was by virtue of sec. 31 as enacted by sec. 8 of the amending Act of 1920—things in action are "property" under sec. 2 (*dd*) and are therefore covered by sec. 31.

The assignment of the book-debt having been made within 3 months preceding the authorised assignment, the burden of establishing that it was not made with a view of giving the assignee-creditor a preference over the other creditors was cast upon the assignee-creditor, and evidence of pressure would be of no avail to support the transaction: sec. 31 (2).

The debtor was, at the time of the transaction, an "insolvent person" within sec. 31, for he had "been unable to meet his obligations as they became due," and had "ceased paying his current obligations in the ordinary course of business:" sec. 2 (*t*).

But the transaction was not preferential, because, upon the evidence, the assignee took the assignment in good faith and without knowledge of the debtor's insolvent condition.

Knowledge of financial embarrassment is not of itself knowledge of insolvency.

Gibbons v. McDonald (1892), 20 Can. S.C.R. 587, *Benallack v. Bank of British North America* (1905), 36 Can. S.C.R. 120, and *Dana v. McLean* (1901), 2 O.L.R. 466, applied.

MOTION by the trustee, an authorised trustee to whom E. O. Webb, an insolvent debtor, had made an authorised assignment under the Bankruptcy Act, to set aside an assignment of a book-debt made by the insolvent to James Lloyd & Son.

March 22. The motion was heard by ORDE, J., in Chambers.

L. E. Dancey, for the trustee.

William Proudfoot jun., for James Lloyd & Son.

July 14. ORDE, J.:—The trustee moves to set aside an assignment of a book-debt made by the insolvent to James Lloyd & Son. The motion came on summarily under the provisions of

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Bankruptcy Rule 120. The affidavit evidence was supplemented by the cross-examination of one of the deponents and by the examination for discovery of Roy L. Lloyd, taken before a special examiner at Goderich.

The alleged assignment of the book-debt took place on the 6th November, 1920. The authorised assignment under the Bankruptcy Act was made on the 8th December, 1920.

Webb carried on a grocery business at Goderich, which he had purchased in August, 1919, giving a chattel mortgage to the vendor to secure part of the purchase-money. James Lloyd & Son were fruit and general commission merchants in Goderich and had done business with the man from whom Webb purchased his business and continued to sell to Webb afterwards. On the 20th October, 1920, Webb was indebted to James Lloyd & Son in the sum of \$490.51, and on that date Lloyds drew on him at sight for that amount. The draft was accepted by Webb on the 28th October, but was not paid when it fell due on the 1st November. On the 23rd and 26th October, Lloyds sold to Webb two small quantities of merchandise amounting to \$21.74 in all. In the statement filed by Lloyds with the trustee, credit is given as of the 3rd November, 1920, for a "contra-account" of \$115.93. R. L. Lloyd on his examination explains that this was his house-account (by which I assume he means his personal house-account), and that he dealt at Webb's all the time. He says Webb's account for this had been rendered, but whether it was credited to Lloyd's firm as a matter of course, or as a result of the interview about to be mentioned, is not clear.

On the 4th November, 1920, R. L. Lloyd called to see Webb, but Webb was not in. Lloyd mentions this visit specially, but, according to Macaulay, Webb's chief clerk, Lloyd had been coming in almost every day to see Webb about his indebtedness and about the failure to pay earlier acceptances. Lloyd says he saw Webb on the 5th November, 1920, and asked him about the unpaid draft for \$490.51. Webb told him that he had cheques coming in from the steamship companies and that there was approximately \$5,000 owing him on his books, and it was making him hard up at the time. Lloyd examined Webb's books and satisfied himself that Webb had that amount owing him. He made no further investigation. Webb wanted some more goods, and Lloyd asked him what security he would give and suggested that he should assign one of the book-accounts "and then I can advance you some more credit." Webb then picked out one of the book-accounts, that against the Algoma Central Steamship Company for \$541.18, which Lloyd said would about balance his account at that time. This was correct if the \$115.93

credit was not taken into account. Webb told Lloyd he could give him the Algoma Central account, and then asked Lloyd for an advance of \$200 to pull him through his difficulty. On the 6th November, 1920, Webb signed the following document:—

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“The undersigned, for valuable consideration, hereby agrees to assign and transfer to James Lloyd & Son the entire account held by him against the Algoma Steamship Company, amount \$541.18. The undersigned also certifies the account absolutely correct, and has not been previously attached or assigned to any other person or firm.”

On the 9th November, Lloyds gave Webb a cheque for the \$200, and this appears as a debit item in the account, and they also sold him on the 16th and 17th November and the 2nd December some small quantities of merchandise amounting in all to \$33.82, and they gave him credit for a cash payment of \$12.40 and for two small further contra-accounts amounting to \$29.20.

On the 8th November, 1920, Lloyds notified the Algoma Central of the assignment, and on the same day received \$292.38 from that company on account of the \$541.38. This left, at the time of Webb's assignment on the 8th December, \$296.16 due by Webb to Lloyds, against which Lloyds held the security of the book-debt assignment in respect of the balance due from the Algoma Central of \$248.80.

The trustee contends that the assignment of the Algoma Central account to Lloyds was fraudulent and void and should be set aside. Counsel for the trustee stated on the argument that he was not claiming a refund of the \$292.38 which the Algoma Central had paid. It was suggested that this sum had been in fact paid by the Algoma Central by cheque to Webb and that the latter endorsed it over to Lloyds.

Section 30* of the Bankruptcy Act has no application here, as this case comes within the proviso at the end of sub-sec. 1, which excepts an assignment of a book-debt due at the date of the assignment from a specified debtor. If the assignment is void it must be so by virtue of the provisions of sec. 31‡ as enacted by sec. 8 of the amending Act of 1920. “Things in action” are “property” under para. (dd) of sec. 2, and are therefore covered by sec. 31.

*30. (1) Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book-debts, or any class or part thereof, and is subsequently adjudicated bankrupt or makes an authorised assignment, the assignment of book-debts shall be void against the trustee in the bankruptcy, or under the authorised assignment, as regards any book-debts which have not been paid at the date of the petition in bankruptcy or of the authorised assign-

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The assignment of the book-debt having been made within 3 months preceding the authorised assignment, the burden of establishing that it was not made with a view of giving James Lloyd & Son a preference over the other creditors is cast upon them, and evidence of pressure cannot avail to support the transaction: sec. 31, sub-sec. 2.

That Webb was at the time an "insolvent person" within sec. 31 is clear from the definition of those words in para. (t) of sec. 2. He had for some time "been unable to meet his obligations as they became due," and had "ceased paying his current obligations in the ordinary course of business." But, under the authorities, the transaction will not be preferential if James Lloyd & Son took the assignment in good faith and without any knowledge of Webb's insolvent condition. The Supreme Court of Canada in *Stephens v. McArthur* (1891), 19 Can. S.C.R. 446, decided that the word "preference" *per se* meant a voluntary preference, and that the instruments to be avoided as having the effect of a preference were only those which were the spontaneous

ment, unless there has been compliance with the provisions of any statute which now is or at any time hereafter may be in force in the Province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments. Provided that nothing in this section shall have effect so as to render void any assignment of book-debts, due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book-debts included in a transfer of a business made *bonâ fide* and for value, or in any authorised assignment.

(2) For the purposes of this section "assignment" includes assignment by way of security and other charges on book-debts.

§31. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, praying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within 3 months after the date of making, incurring, taking, paying or suffering the same, or if he makes an authorised assignment, within 3 months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorised assignment.

(2) If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *primâ facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

(3) For the purposes of this section, the expression "creditor" shall include a surety or guarantor for the debt due to such creditor.

acts of the debtor, and that consequently pressure by the creditor deprived the transaction of any voluntary character.

The meaning given to the word "preference" by the judgment in *Stephens v. McArthur* and by the judgment of the same court in the earlier case of *Molsons Bank v. Halter* (1890), 18 Can. S.C.R. 88, might perhaps indicate that, in order to constitute a preference at all, the act must of necessity be a voluntary one on the part of the debtor. But the provisions of subsec. 2 of sec. 31 (which follow substantially the corresponding provisions of sec. 5 of the Ontario Assignments and Preferences Act, R.S.O. 1914, ch. 134, and of similar Acts in other Provinces), make it clear that a transaction may be preferential, even if voluntary, so that its preferential character is to be determined not by the state of mind of the debtor when he entered into it, but by its effect in giving to the creditor preferential treatment over the other creditors of his debtor. But it seems still to be necessary, in order that the transaction may be held to have been entered into "with a view of giving such creditor a preference," to shew that the creditor was aware of the insolvent condition of the debtor. There must still, as held in *Gibbons v. McDonald* (1892), 20 Can. S.C.R. 587, 589, and in *Benallack v. Bank of British North America* (1905), 36 Can. S.C.R. 120, 129, "be a concurrence of intent on the one side to give and on the other to accept a preference over other creditors." And see *Dana v. McLean* (1901), 2 O.L.R. 466.

What was Lloyd's knowledge on the 5th November, 1920, when he made the arrangement with Webb? He admits that earlier drafts for smaller amounts which Webb had accepted had been returned unpaid, and these had apparently not been met when the draft for \$490.50 was drawn to cover the amount of Webb's indebtedness at that time. He says he did not know Webb was financially embarrassed; that Webb had been paying him up "first class until the last month and a half." But his statement that he did not know Webb was financially embarrassed (those are his exact words—see questions 93 and 94 of his examination) is rather surprising in view of the following paragraph in his letter to the Algoma Central of the 8th November, 1920, giving notice of the assignment of the account: "Beg to state that Mr. Webb has through unforeseen events been confronted with heavy obligations to meet immediately, and this course of procedure is forced on him to relieve financial embarrassment," etc. And he admits that he was aware that Bissett, another creditor, was "bothering Webb every day," and that Webb wanted the \$200 to pay Bissett off. It is rather significant as to this alleged advance that Lloyds received the \$292.38 from

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the Algoma Central on the 8th November and that the \$200 was not paid to Webb until the 9th November. In addition to the \$292.38, there was also the \$115.93, Lloyd's house-account, which had been credited, so that when Lloyds advanced the \$200 the indebtedness had been reduced by \$408.31. According to Macaulay, Webb's clerk, the proposal to advance the \$200 was made by Lloyd, who appeared to be anxious to get some security for the existing indebtedness.

While the evidence is not wholly satisfactory, I have come to the conclusion upon it that Lloyd was not really aware of Webb's insolvent condition when he took the assignment. The mere fact that a man is financially embarrassed is not of itself evidence of insolvency, and there is nothing improper in a creditor's pressing for payment of an overdue account, or, failing to get payment, pressing for and obtaining some security therefor. That a creditor presses for and takes security to protect himself in the event of a possible insolvency goes without saying: all security is really given for that purpose. To hold that a creditor cannot take any steps to secure himself under such circumstances would mean that the creditor would be fastened with knowledge of the debtor's insolvency upon its being shewn that such insolvency actually existed, whether the creditor actually knew it or not, such knowledge being imputed to him because of the mere fact that he took a security because the debtor's financial embarrassment prevented immediate payment.

The motion of the trustee will therefore be dismissed with costs, and James Lloyd & Son will be entitled to hold the balance due from the Algoma Central as security for their claim against the insolvent estate. The trustee's costs will be paid out of the estate.

[IN BANKRUPTCY.]

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July 16.

RE LAING.

Bankruptcy—Claim of Wife of Debtor under Marriage Settlement—Covenant to Pay Wife Sum of Money 3 Months after Decease of Debtor if she should Survive—Covenant to Pay forthwith in Event of Insolvency—Fraud upon Creditors—Contingent Future Debt—Proof in Bankruptcy—Valuation—Bankruptcy Act, sec. 44—Bankruptcy Rule 119—Right of Wife to Rank upon Estate as Unsecured Creditor.

L. having made an authorised assignment under the Bankruptcy Act, his wife filed with the trustee a claim for \$10,000 under a pre-nuptial marriage contract, by which the future husband bound himself, his heirs and representatives, to pay \$10,000 to the future wife within 3 months after his death; and "in the event of the future husband becoming insolvent during the said marriage, the said sum of \$10,000, or so much thereof as may then remain unpaid, shall forthwith become due and exigible, and the future husband will lose and forfeit the benefit of the term hereinbefore stipulated in his favour for the payment thereof." In the event of the wife pre-deceasing the husband, the \$10,000 was to return to and be the property of the husband:—

Held, that the purported settlement of \$10,000 upon the wife, though expressed to be a gift to her based upon the consideration of the marriage and other considerations as to community, etc., was really a covenant by the husband to pay that sum to his wife in certain events, and the payment was contingent upon her survivorship.

The covenant that the money should become payable on insolvency was fraudulent and void as against the creditors of the husband.

In re Brewer's Settlement, [1896] 2 Ch. 503, and earlier cases, followed.

If the covenant were treated as an independent covenant to pay upon the covenantor becoming insolvent, there was in fact no debt due by the covenantor up to the moment of his insolvency.

A debt payable at a future time or upon a contingency may be the subject of proof, but it must be valued: Bankruptcy Act, sec. 44; and there was here a debt payable on a contingency and provable in bankruptcy.

Ex p. Tindal (1832), 8 Bing. 402, followed.

The procedure in valuing contingent claims laid down in Bankruptcy Rule 119 should be followed.

The wife was entitled to rank upon the estate as an ordinary unsecured creditor and not otherwise.

AN appeal by Mabel L. Laing from the disallowance, by the trustee in bankruptcy of the estate of A. R. Laing, the appellant's husband, an insolvent, of her claim to rank as a creditor of the estate of the insolvent, under the provisions of a marriage settlement.

June 10. The appeal was heard by ORDE, J., in Chambers.

S. H. Bradford, K.C., for Mabel L. Laing.

J. M. Bullen, for the trustee.

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July 16. ORDE, J.:—The marriage settlement was made on the 15th April, 1909, before a notary in Montreal. At that time the domicile of the intended husband was in the Province of Quebec, while that of the intended wife was in the Province of Ontario. The marriage took place in Ontario on the 12th June, 1909. The husband subsequently changed his domicile to Ontario, and in February, 1920, commenced business in Brantford. The business did not succeed, and on the 27th December, 1920, Laing made an authorised assignment under the Bankruptcy Act. Among the claims filed is one by his wife of \$10,000, under the marriage settlement already mentioned.

The marriage settlement, after reciting the intended marriage, contains several provisions which usually appear in marriage contracts in the Province of Quebec, such as that there shall be no community of property, as to the wife's jewelry, wearing apparel, etc., as to the husband's obligation to maintain the household, and that the wife shall have no dower. Then follows a provision whereby the intended husband, "in consideration of the foregoing stipulations and of love and affection," purports to "give by way of donation *inter vivos* unto the said future wife:"—

First, the sum of \$3,000, to be spent in the acquisition of household furniture, ornaments, etc., which are to belong to the future wife as her absolute property, but are to be subject to the joint use of the future consorts during their joint lives, and, in the event of her predeceasing him, are to revert to him and become his absolute property.

"Second, the sum of \$10,000, which he binds and obliges himself, his heirs and representatives, to pay to the future wife within 3 months after his death, with the right to him to make payments on account during his lifetime, either by investments in the name of the said future wife, by mortgage or hypothec upon or the purchase of immovable property, or in any other way.

"The revenues to be derived from the said sum of \$10,000, or from any payment so made on account thereof, shall during the lifetime of the future husband be contributed to the general expenses of the household, and be administered by him and be as an alimentary provision for his wife.

"In the event of the future husband becoming insolvent during the said marriage, the said sum of \$10,000, or so much thereof as may then remain unpaid, shall forthwith become due and exigible, and the future husband will lose and forfeit the benefit of the term hereinbefore stipulated in his favour for the payment thereof.

“But it is further agreed that in the event of the future wife predeceasing the future husband the said sum of \$10,000 or any investments or payments which may have been made on account thereof, and also all insurances on his life effected for her benefit or payable to her, shall return to and be the property of the future husband, without the heirs of the future wife having any right therein or claim thereto.”

No sums have been paid by the husband to the wife on account of the \$10,000, and she now claims by virtue of his insolvency to be entitled to rank against his estate in respect thereof.

The purported settlement of \$10,000 upon the wife, though expressed to be a gift to her based upon the consideration of the marriage and the other considerations involved in the provisions as to community, etc., is really a covenant by the husband to pay that sum to his wife in certain events. This covenant calls for payment to her within 3 months after his death, but this obligation is necessarily dependent, by reason of the last paragraph of the contract, upon her surviving him. Consequently the gift is contingent upon her survivorship. Even payments made during the husband's lifetime on account of the \$10,000 give her no immediate benefit, because the income therefrom is to be administered by him for the general expenses of the household and as an alimentary provision for the wife, all of which he is already bound to provide under one of the earlier covenants of the agreement; and in the event of her predeceasing him any moneys so paid on account revert to him. Then there is the provision whereby this contingent payment is to be accelerated in the event of the husband becoming insolvent, in which event the same “shall forthwith become due and exigible.”

The wife claims that under this last mentioned provision of the agreement, by reason of her husband's insolvency, the \$10,000 is now due and exigible, and that she is entitled to rank as a creditor therefor, and in the alternative that she is entitled to have her claim, based upon the contingency of her surviving her husband, valued and to rank as a creditor for such value.

The claim to rank for the full \$10,000, as having become due because of the husband's insolvency, cannot stand. It is a well-recognised principle of bankruptcy law that, in a settlement by the husband of his own property whereby he retains a life-interest, a provision that his life-interest shall cease upon bankruptcy or insolvency is void as being a fraud upon the bankrupt law: *Higinbotham v. Holme* (1812), 19 Ves. 88; *Whitmore v. Mason* (1861), 2 J. & H. 204; *In re Detmold* (1889), 40 Ch. D. 585, at pp. 587-8; *In re Brewer's Settlement*, [1896] 2 Ch. 503. And, if this is so where there is an actual settlement of the settlor's

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property in favour of trustees for the settlement, *â fortiori* is it so where the settlement is nothing more than a covenant to pay at the death of the settlor.

If the covenant that the amount shall become due upon insolvency is treated as an independent covenant to pay upon the covenantor becoming insolvent, then, quite apart from the principle that such a covenant is a fraud upon the bankrupt law, there is in fact no debt due by the covenantor up to the moment of his insolvency. As Lord Redesdale says in *In re Murphy* (1803), 1 Sch. & Lef. 44, at pp. 49 and 50: "Nor really can anything, where the contingency is an act of bankruptcy, and where the demand does not arise till an act of bankruptcy committed, be provable under it, because it did not exist before it." And see *In re Hoskins* (1877), 1 A.R. 379; *Ex p. Mackay* (1873), L.R. 8 Ch. 643. It might perhaps be argued here that "insolvency" within the meaning of the marriage settlement might take place without an act of bankruptcy having been committed, so as to entitle the wife to payment before the settlor came under the operation of the Bankruptcy Act. But whether this might be possible or not is really immaterial. The authorities I have cited make it clear that the covenant that the money shall become payable on insolvency is fraudulent and void as against the creditors of the husband.

It is clear from the provisions of sec. 44* of the Bankruptcy Act and from authority that a debt payable at a future time or upon a contingency may be the subject of proof, but it must be valued. A covenant in a marriage settlement that a sum of money will be paid to the wife at or within a definite period after the husband's death in case she survives him is a debt payable on a contingency which is provable in bankruptcy: *Ex p. Tindal* (1832), 8 Bing. 402.

That case is clearly in point here, and I accordingly hold

*44. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy or in proceedings under an authorised assignment.

(2) Save as aforesaid, all debts and liabilities, present or future, to which the debtor is subject at the date of the receiving order or the making of the authorised assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or of the making of the authorised assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorised assignment.

(3) The Court shall value, at the time and in the summary manner prescribed by General Rules, all contingent claims and all such claims for unliquidated damages as are authorised by this section, and after, but not before, such valuation, every such claim shall, for all purposes of this Act, be deemed a proved debt to the amount of its valuation.

that Mabel L. Laing is entitled to prove her claim for the value of her husband's covenant to pay her \$10,000 within 3 months after his death if she should survive him.

It was suggested that I might value her claim in the manner indicated in *Ex p. Tindal, supra*. But Bankruptcy Rule 119 lays down the procedure to be adopted in valuing contingent claims. The trustee will therefore take the necessary steps to settle the value, first by compromise or arrangement with the claimant, and failing that by application to the Court. Upon that application all the necessary material, especially actuarial evidence as to the probable length of the life of each, and the probability of her survivorship, must be given.

The proof as filed in addition claimed a preference over other creditors. There is no ground for this. The wife must rank as an ordinary unsecured creditor and not otherwise.

Success on this appeal having been equally divided, there will be no order as to costs.

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July 18.

GODIN V. MURDOCH AND SILVERSON.

Justice of the Peace—Issue of Warrant for Arrest upon Criminal Charge—Acquittal—Action for False Imprisonment—Reasonable and Probable Cause—Malice Negatived by Jury—Jurisdiction of Justice in Town where there is a Police Magistrate—Limitation by Police Magistrates Act, sec. 18—Warrant Made Returnable before Justice Issuing it or other Justice of District—Irregularity—Accused Brought before Police Magistrate—Protection of Justice—Public Authorities Protection Act, secs. 3, 4.

The plaintiff was arrested upon a warrant, issued by the defendant M. as a Justice of the Peace for the town of R., and executed by the defendant S. as a constable. The plaintiff was acquitted of the offence charged, and brought this action for false imprisonment. The trial Judge found that there was reasonable and probable cause, and the jury found that neither defendant was actuated by malice. The jurisdiction of the defendant to act as a Justice of the Peace for the town was limited by sec. 18 of the Police Magistrates Act, R.S.O. 1914, ch. 88, there being at the time a Police Magistrate for the town:—

Held, applying the *ejusdem generis* rule, that sub-sec. 1 of sec. 18 deals only with matters arising after the issue of the summons or the arrest under the warrant; sub-sec. 3 does not extend the meaning of sub-secs. 1 and 2; and the defendant M. had jurisdiction to issue the warrant, but having done so his jurisdiction ceased.

The warrant, signed by M., with the letters "J.P." after the signature, directed the constables to whom it was addressed to bring the plaintiff "before me or some other Justice of the Peace in and for the District of," etc. The plaintiff was brought before the Police Magistrate, who admitted him to bail:—

1921. *Held*, that nothing was in fact done by M. in excess of his powers.
 ——— Assuming that sub-sec. 3 of sec. 18 required that the warrant should
 GODIN on its face be made returnable before the Police Magistrate, the fail-
v. ure to make it so returnable was at most an irregularity, which did
 MURDOCH not disentitle M. to the protection of sec. 3 of the Public Authorities
 AND Protection Act, R.S.O. 1914, ch. 89.
 SILVERSON. *Kelly v. Barton* (1895), 26 O.R. 608, 621, 22 A.R. 522, followed:
 The jury having negatived malice, and M. being entitled to the protec-
 tion of the statute, the action should be dismissed as against both
 defendants.

AN action for false imprisonment.

June 20. This action was tried by ORDE, J., with a jury, at Fort Frances.

C. R. Fitch, for the plaintiff.

F. M. Burbidge, for the defendant Murdoch.

G. S. Bowie, for the defendant Silverson.

July 18. ORDE, J.:—This was an action for false imprisonment, arising out of the plaintiff's arrest upon a warrant issued by the defendant Murdoch as a Justice of the Peace by virtue of his occupancy of the office of Mayor of the Town of Rainy River, and executed by the defendant Silverson, a constable. The offence charged was a breach of the Ontario Temperance Act. The plaintiff was acquitted of the offence charged.

There was ample evidence of reasonable and probable cause, and the only questions submitted to the jury were as to the malice of the defendants and the question of damages.

The jury found that neither defendant was actuated by malice, and I accordingly dismissed the action with costs, first saying to counsel, in effect, that the verdict left no opening for any other judgment. On the following day, counsel for the plaintiff, in the absence of counsel for the defendants, raised the point that, upon the facts, the defendants, and particularly the defendant Murdoch, could not escape liability even in the absence of malice, because, as the plaintiff contended, the defendant Murdoch had no jurisdiction whatever to issue the warrant, there being at the time a Police Magistrate for the Town of Rainy River, who was then in the town, and further that, even if he had jurisdiction to issue the warrant, he had no power to issue a warrant returnable otherwise than before such Police Magistrate.

I thereupon gave the plaintiff leave to notify the defendants that I would consider an application to reopen the matter on these points, and that I desired a written argument upon them from counsel.

At the time the warrant was issued the defendant Murdoch was duly qualified by virtue of his office of Mayor to act as a Justice of the Peace in and for the Town of Rainy River, but there was at that time a Police Magistrate for that town, so that, by sec. 18 of the Police Magistrates Act, R.S.O. 1914, ch. 88,* the jurisdiction of the defendant to act as a Justice of the Peace was limited. And it is contended that, having as alleged acted in excess of his jurisdiction, he is not entitled to the benefit of sec. 3 of the Public Authorities Protection Act, R.S.O. 1914, ch. 89,† but is liable under sec. 4 of that Act, without proof that he acted maliciously and without reasonable and probable cause.

Mr. Fitch contends that the provisions of sub-sec. 1 of sec. 18 of the Police Magistrates Act prevent a Justice of the Peace from issuing either a summons or a warrant unless the Police Magistrate is ill or absent or has requested the Justice of the Peace to act. But, quite apart from the provisions of sub-sec. 3 of that section, it seems clear that sub-sec. 1 deals only with matters arising after the issue of the summons or the arrest under the warrant. The Justice of the Peace must not "admit to bail or discharge a prisoner or adjudicate upon or otherwise act," all indicating proceedings subsequent to the summons or arrest. The *ejusdem generis* rule limits the word "otherwise" to acts of the same character as those mentioned, because if not

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*18.—(1) No Justice of the Peace shall admit to bail or discharge a prisoner or adjudicate upon or otherwise act until after judgment in a case arising in a city or town for which there is a Police Magistrate appointed under sections 13 or 14, where the initiatory proceedings were taken before such last mentioned Police Magistrate, except at the Court of General Sessions of the Peace, or in the case of illness or absence or at the request of the Police Magistrate.

(2) Where the initiatory proceedings in any case are taken before a Police Magistrate no Justice of the Peace shall admit to bail or discharge the prisoner or adjudicate upon or otherwise act in such case, save as mentioned in sub-section 7, until after judgment.

(3) Nothing in this section shall prevent a Justice of the Peace acting within his territorial jurisdiction from taking an information or issuing a summons or warrant returnable before the proper Police Magistrate.

†3. No action shall lie or be instituted against a Justice of the Peace for any act done by him in the execution of his duty as such Justice with respect to any matter within his jurisdiction as such Justice, unless the act was done maliciously and without reasonable and probable cause.

4.—(1) For any act done by a Justice of the Peace in a matter in which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, or for any act done under a conviction or order made or a warrant issued by him in such matter, any person injured thereby may maintain an action against the Justice in the same case as he might have heretofore done, and it shall not be necessary to allege or prove that the act was done maliciously and without reasonable and probable cause.

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so limited the word "act" would cover everything which the Justice of the Peace could do and there would be no necessity for mentioning any particular acts. Sub-section 3 has been inserted *ex abundanti cautelâ*, but I do not think it can be relied on as extending the meaning of the two earlier sub-sections. The defendant Murdoch had therefore jurisdiction to issue the warrant, but having done so his jurisdiction ceased.

The warrant, which purports to be taken before "the undersigned Alexander C. Murdoch, a Justice of the Peace in and for the Town of Rainy River," and is signed "A. C. Murdoch, J.P.," directs the constables to whom it is addressed to bring the plaintiff "before me or some other Justice of the Peace in and for the said District of Rainy River." I note in passing that Mr. Fitch in his written argument says that Murdoch did not add the initials "J.P." after his signature. This statement is not correct.

Had the plaintiff been brought before Murdoch, and had the latter acted in any way other than to direct that the plaintiff be brought before the Police Magistrate, Murdoch would clearly have exceeded his jurisdiction. But the plaintiff was brought before the Police Magistrate, who admitted him to bail, so that nothing was in fact done by Murdoch in excess of his powers, unless the mere fact that the warrant was made returnable "before me or some other Justice of the Peace," etc., instead of "before the Police Magistrate in and for the Town of Rainy River," constitutes an act in excess of his jurisdiction disentitling him to protection.

I do not think it necessary to determine whether or not subsec. 3 of sec. 18 makes it necessary that the warrant issued by a Justice of the Peace under such circumstances should be made on its face returnable before the Police Magistrate. It would doubtless be safer and therefore preferable to do so in all such cases; but, even assuming that the Act requires that the warrant shall on its face be made returnable before the Police Magistrate, the failure to make it so returnable, if the warrant was not improperly acted upon, did not amount to the exercise of any act in excess of Murdoch's jurisdiction, but was at most an irregularity. The case was simply one where an "officer in discharge of a public duty acts irregularly or erroneously," and so is "entitled to the qualified protection of the statute:" Boyd, C., in *Kelly v. Barton* (1895), 26 O.R. 608, at p. 621, affirmed in appeal, 22 A.R. 522. Murdoch is therefore entitled to the protection of sec. 3 of R.S.O. 1914, ch. 89; and, the jury having negatived malice, the action against him and the constable must be dismissed.

The judgment which I pronounced at the trial dismissing the action with costs will therefore stand, but there should be a stay until the 15th September next, to enable the plaintiff to appeal if so advised.

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[IN BANKRUPTCY.]

RE ROCKLAND COCOA AND CHOCOLATE CO. LIMITED.

1921.

July 26.

Sale of Goods—Delivery by Instalments—Payment at Market Price on Day of Delivery of each Instalment—Failure of Purchaser to Call for Deliveries—Duty of Vendor—Damages—Sale of Goods Act, 10 & 11 Geo. V. ch. 40, secs. 31, 49 (3)—Bankruptcy of Purchaser—Claim of Vendor to Rank upon Estate—Disallowance.

The insolvent company in October, 1919, agreed to buy from a sugar company 3,000 barrels of sugar, to be delivered during the year 1920 by instalments of about 3 car-loads per month, and the price to be the market price on the day of the delivery of each car-load. The sugar company filed with the trustee in bankruptcy of the insolvent company a claim for damages based upon the failure of the insolvent company to call for and take deliveries during the last 5 months of 1920. The insolvent company did not call for deliveries under the contract in each of these months because the sugar company had intimated that there would be no more deliveries until the outstanding account for previous deliveries was settled. The insolvent company made no demand for deliveries and the sugar company made no tender:—

Held, that the sugar company could not be permitted to lie by until the whole period of the contract was up and then claim damages for the failure to call for delivery during each of the preceding 5 months; it was the duty of the insolvent company to call for deliveries each month, and they were not entitled to call for them in subsequent months; but the obligation of the sugar company to deliver the month's instalments, ceasing at the end of each month, entailed a corresponding duty immediately to tender the goods and to sell the released quantity at the best market price—each instalment being in this respect treated as if it was the subject of a separate contract.

Doner v. Western Canada Flour Mills Co. Limited (1917), 41 O.L.R. 503, applied and followed.

Section 49 (3) of the Sale of Goods Act, 10 & 11 Geo. V. ch. 40, is applicable to an instalment contract, and sec. 31 strengthens the view that the compensation is to be calculated as of the date of the breach.

The sugar company, having failed to protect themselves as default was made from time to time, were not entitled to any damages for the alleged breach of contract by the insolvent company.

AN appeal by the Dominion Sugar Company Limited from the disallowance, by the trustee under the Bankruptcy Act of the insolvent estate of the Rockland company, of the sugar company's claim of \$20,183.67 for damages for alleged breach of contract.

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ROCKLAND
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June 25. The appeal was heard by ORDE, J., in Court, upon *vivâ voce* evidence, under Bankruptcy Rule 117.

J. M. Pike, K.C., for the sugar company.

M. L. Gordon, for the trustee.

July 26. ORDE, J.:—On the 7th October, 1919, the Rockland company agreed to buy from the sugar company 3,000 barrels of sugar, “to be distributed for year 1920 at the rate of about 3 cars per month; price to be the market price on the day each car is delivered.” In August, 1920, there was a dispute between the two companies arising out of an alleged shortage in the deliveries to which the purchasers were entitled under the contract, which was adjusted as set forth in a letter from the Rockland company to the sugar company of the 26th August, 1920. By this adjustment, the sugar company were to allow the Rockland company a credit of \$7,007 and to deliver 224,420 lbs. of sugar, which was the extent of the shortage, within 15 days, at a fixed price; and it was further provided that “deliveries under above contract, dated October 7th, 1919, for the month of July, to be taken at the prices already invoiced and for the successive months at the current market price ruling on the date of delivery.”

At the date of this adjustment, there was owing by the Rockland company to the sugar company about \$33,000, and Mr. McGregor, of the sugar company, says that, while on that date the sugar company were ready to deliver the 224,420 lbs. of sugar, his company expected immediate payment of the amount then due. Not receiving payment, the sugar company telegraphed from their head office at Chatham on the 28th August: “Very badly disappointed not receiving settlement old account. Trust have remittance Monday without fail.” On the 31st August the sugar company delivered 50,000 lbs. of the 224,420, and on the 2nd September, 1920, wrote to the Rockland company as follows:—

“Following up our agreement of August 26th, 1920, wherein we agree to deliver 224,420 pounds of granulated sugar, within 15 days from that date, we now advise we are in a position to deliver the balance, 174,420 pounds. Will you arrange a settlement of your account, as arranged by you, so we may make delivery of the above quantity of sugar within the specified time?”

The Rockland company had, on the 31st August, paid \$16,000 on account, but they still owed, including the price of the 50,000 lbs. delivered that day, about \$24,000. As a result of the letter of the 2nd September, Mr. Kendall, of the Rockland company,

telephoned to the sugar company, and he says he was told that they could get no sugar until the account was paid. He then went to Chatham and arranged for an extension of time for the payment of the arrears. The sugar company then continued to ship sugar, and by the 4th September had, with the 50,000 lbs. delivered on the 31st August, delivered 224,413 lbs. to make up the shortage of 224,420 lbs. mentioned in the letter of the 26th August, 1920. The Rockland company had made some further payments between the 31st August and the 14th September, amounting in all to \$17,022.87, but by reason of the further deliveries they were still indebted to the sugar company to the extent of about \$38,000.

The sugar company's claim for damages rests upon the failure of the Rockland company to call for and take during the 5 months between the 31st July, 1920, and the 1st January, 1921, the balance of the sugar contracted for on the 7th October, 1919, and referred to in the concluding paragraph of the letter of the 26th August, 1920. They say they had this sugar ready for delivery, and that they sold it at prices which, compared with those prevailing from time to time during those 5 months, resulted in a loss of \$20,183.67, for which they now claim to rank. The sugar company say that it was the duty of the Rockland company to call for monthly deliveries under the contract, and, not having done so, they are liable in damages. There was some contradictory evidence as to an arrangement that these further shipments were not to be made until after the New Year, but I am unable to find that there was any such arrangement. It was incumbent upon the Rockland company under the contract to call for deliveries each month. They say they did not do so because the sugar company had intimated that there would be no more deliveries until the outstanding account was settled. Both parties lay by and did nothing, the Rockland company making no demand for deliveries and the sugar company making no tender.

The situation is to all intents the same as that in *Doner v. Western Canada Flour Mills Co. Limited* (1917), 41 O.L.R. 503, 41 D.L.R. 476. Without going the length of holding that there was a tacit abandonment or relinquishment, on both sides, of the balance of the contract, as suggested there by Hodgins, J.A., it seems to me that the sugar company cannot be permitted to lie by until the whole period of the contract is up and then claim damages for the failure to call for delivery during each of the preceding 5 months. The principles applied in the *Doner* case are applicable here, and I think required the Rockland company to call for deliveries each month, and disen-

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titled them to call for them in subsequent months. But the obligation on the part of the vendors to deliver the month's instalments, ceasing at the end of the month, surely entailed a corresponding duty immediately to tender the goods and to sell the released quantity at the best market price. Each instalment must in this respect be treated as if it was the subject of a separate contract. If the failure to order during any one month constituted such a breach as, on the authority of the *Doner* case, entitled the vendors to refuse to make up that delivery in any subsequent month, then, if the vendors intend to hold the purchasers liable for the breach, the damages must surely be those which they sustained when the breach occurred. In their letter to the Rockland company, of the 15th December, 1920, the sugar company ask for orders for delivery before the end of the year. I cannot see that this improves their position. I think it was too late then for the sugar company to expect to hold the Rockland company for the higher prices prevailing during the earlier months and to claim damages on that footing.

Sub-section 3 of sec. 49 of the Sale of Goods Act (10 & 11 Geo. V. ch. 40), dealing with the case where the buyer wrongfully neglects or refuses to accept and pay for the goods, provides that, "where there is an available market for the goods in question, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price *at the time or times when the goods ought to have been accepted.*" Even without the words "or times," this would apply, I think, to an instalment contract. But the expression "at the time or times" makes it clear that the section is applicable to a contract calling for deliveries at different times. And there is nothing in sec. 31* to affect this. On the contrary, the expression "whether it is a severable breach giving rise to a claim for compensation" strengthens the view that the compensation is to be calculated as of the date of the breach.

If I am correct in these conclusions, then the sugar company

*31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or fails to deliver one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

failed to take the necessary steps to protect themselves as the Rockland company made default from time to time, and cannot, in my judgment, be entitled to any damages for the alleged breach of contract by the Rockland company. As the price which the Rockland company were to pay was the market price prevailing at the time of delivery, it is obvious that unless there was a sudden drop in price immediately after the end of each month, or the sugar company were unable to get a purchaser at all by reason of there being no market (a situation hardly possible under the circumstances) the damages for the breach would be only nominal.

The appeal from the decision of the trustee will, therefore, be dismissed with costs.

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Insurance (Life)—Assignment of Policy to Wife "for Value Received"—Wife Predeceasing Assured—Contest between Estate of Wife and Estate of Assured — Evidence — Preferred Beneficiary — Ontario Insurance Act, secs. 171, 178—Claim by Executor of Wife to be Repaid Money Paid for Premiums to Keep Alive other Policies on Life of Husband—Lien—Contract—Salvage—Possession of Policies—"Beneficial Owner"—"Beneficiary"—Payments Made by Wife's Sister—Conversion by Wife of Properties of Assured—Counterclaim by Administrator of Estate of Assured—Onus—Failure of Claim—Foreign Executor of Wife—Status of Plaintiff—Insurance Act, sec 177—Parties—Amendment.

An insurance policy on the life of F., issued in 1882, was made payable to his assignees or legal representatives; in 1890 he executed and lodged with the insurance company an absolute assignment of the policy to his wife, expressed to be "for value received;" and no later assignment or instrument purporting to revoke or vary it was ever executed by him, except that in 1906 he—forgetting the absolute assignment—executed a declaration under the Ontario Insurance Act in his wife's favour. F.'s wife predeceased him, and on his death the fruits of the policy were in dispute between her executor and the administrators of his estate, the latter contending that the assignment was no more than a declaration that the wife was the beneficiary, and, as she died first, that it was of no avail: sec. 178 (7) of the Act:—

Held, that, in the absence of any evidence that no value was in fact given by the wife, the words "for value received" were not, in a contest between the estate of the assignee and the estate of F., to be treated as of no effect; the wife was an assignee for value of the policy; and upon her death, even in her husband's lifetime, her title to the policy passed to her legal personal representative as part of her estate.

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The mere fact that the assignee for value belonged to the preferred class of beneficiaries (sec. 178 of the Act) did not affect her position, nor enable F. to transfer the benefit of the insurance to some other member of the preferred class; the assignee came under the provisions of sec. 171 and not of sec. 178; and the provision of sub-sec. 7 of sec. 171 did not, in view of sub-sec. 8, apply to the case of an absolute assignment for value.

Book v. Book (1901), 1 O.L.R. 86, followed.

The wife and her sister kept alive four other insurance policies upon the life of F. by paying the premiums for several years before his death. Three of these policies were, on the face of each, made payable to F.'s wife, and as to the fourth F. signed a declaration under the Act that it was to be for the benefit of his wife, who was in possession of the policies. The sister and the executor of the wife claimed, against the executor of F., to be repaid, out of the fruits of these policies, the sums which had been so paid for premiums:—

Held, that the payments were voluntary, and the claimants had no lien by virtue of any contract or by way of salvage or otherwise, and their claim failed.

Money expended by one man to preserve or benefit the property of another does not create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. And one who has an interest in the policy is in no higher position than a stranger who pays the premiums—indeed the payments made by the wife, if voluntary, were presumably made to protect her own interest. The wife, though the “beneficiary,” as that term is used in the Act to describe a person to whom the insurance moneys are made payable, was not the “beneficial owner” of the policy within the meaning of the decided cases.

In re Leslie (1883), 23 Ch. D. 552, specially referred to.

The administrator of the estate of F. claimed from the executor of F.'s wife an account of properties of F. alleged to have been converted by the wife to her own use:—

Held, that the onus was upon the administrator, and the evidence shewed that the properties indicated were the wife's as having been originally purchased with her money or as having been given to her by her husband.

A foreign executor cannot come into Ontario and sue for the recovery of moneys due the testator's estate without first obtaining probate here.

Section 177 of the Ontario Insurance Act, which makes it lawful in certain cases to pay insurance moneys to a foreign executor or administrator, refers only to the legal personal representatives of the insured.

The executor of F.'s wife, one of the plaintiffs in the action, being a foreign company, it was ordered that judgment should not be entered until letters probate of her will or letters of administration with the will annexed had been obtained in Ontario, and leave was given to amend by adding or substituting the Ontario executor or administrator as a plaintiff and by inserting the proper allegations in that regard in the statement of claim.

ACTION to determine the validity of conflicting claims to the proceeds of certain policies of insurance upon the life of Robert H. Fenwick, deceased; and counterclaim by the defendant for a declaration that Alice E. Fenwick, the wife of Robert H.

Fenwick, had converted her husband's properties to her own use, and for an account.

November 18 and 19 and December 28, 1920. The action and counterclaim were tried by ORDE, J., without a jury, at a Toronto sittings.

W. J. Elliott, for the plaintiffs.

A. L. Fleming and *A. L. Smoke*, for the defendant.

July 27. ORDE, J.:—By an order made by Mr. Justice Kelly on the 10th September, 1919, under the provisions of the Ontario Insurance Act and of the Trustee Act, the proceeds of 5 policies of insurance upon the life of the late Robert H. Fenwick were directed to be paid into Court, and it was ordered that an action should be brought to determine the validity of the conflicting claims which had been made to the insurance moneys.

Pursuant to that order, this action is brought by the Fidelity Trust Company of Newark, New Jersey, U.S.A., as executor of the late Alice E. Fenwick (the wife of the late Robert H. Fenwick), and by Carrie Louise Lumsden (a sister of Alice E. Fenwick), against Edward J. Fenwick, the administrator of the estate of the late Robert H. Fenwick, for payment of the insurance moneys or some part thereof. The defendant denies the right of the plaintiffs to the moneys, and by way of counterclaim alleges the conversion by the late Alice Fenwick to her own use of certain moneys, securities, and chattels belonging to her late husband, and asks for an account thereof and for payment to his estate of the amount found due.

Robert H. Fenwick married Alice E. Fenwick in Buffalo, U.S.A., in 1888. He had been a broker carrying on business in Belleville, but at the time of his marriage appears to have had no definite home. After the marriage, Mr. and Mrs. Fenwick lived in Buffalo and Toronto for a time, and then moved to Belleville, where he again took up his brokerage business. Some time before August, 1906, Fenwick had a nervous breakdown and began to shew signs of mental trouble, and in this month he was admitted to the Toronto Asylum for the Insane. He was then about 45 years of age. He remained in the asylum off and on for some years, at times being released because of some improvement in his condition and then being re-admitted when he became worse again. On one occasion he escaped and was recaptured. During most of the times when he was out of the asylum, he was maintained at different sanitarium. He finally left the asylum in July, 1918, going to a sanitarium, where he died on the 26th September, 1918, intestate.

Shortly after his admission to the asylum, his wife left Belle-

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ville and went to live with Mrs. McArthur, another sister, in Buffalo. In 1910 she went to East Orange, New Jersey, to live with Mrs. Lumsden, and died there on the 9th December, 1917. By her will she appointed the Fidelity Trust Company, a New Jersey corporation, her executor, and bequeathed to it \$3,000 in trust to pay out of principal and income \$30 per month for the support of her husband. With the exception of a small legacy of \$300 to her sister Eleanor, she left all the residue of her estate to her sister Carrie Louise Lumsden. Probate of the will was duly obtained by the Fidelity Trust Company in New Jersey, but no probate has yet been granted in Ontario.

Letters of administration of the estate of Robert H. Fenwick were duly granted to his brother, Edward J. Fenwick, the defendant, by the Surrogate Court of the County of York, on the 15th November, 1918.

The plaintiffs' claims to each of the 5 insurance policies do not rest upon the same grounds, so that it is necessary to refer to them with some detail.

Policy No. 8265 in the Sun Mutual Life Insurance Company (afterwards the Sun Life Assurance Company) was issued on the 18th January, 1882, for \$1,000, and was payable "to the assured's assignees or legal representatives." On the 28th January, 1890, Fenwick executed an absolute assignment of the policy to his wife, and lodged the assignment with the insurance company. The assignment is expressed to be "for value received," and no later assignment or any instrument purporting to revoke or vary it was ever executed by him, except that in August, 1906, shortly before going to the asylum, he executed a declaration under the Insurance Act in his wife's favour. This was doubtless made forgetting that the policy had already been absolutely assigned to her. The policy ultimately became fully paid-up. On the 24th April, 1915, during a lucid interval, Fenwick and his wife borrowed \$600 from the insurance company, on the security of the policy. Upon his death, after deducting what was due in respect of this loan, the insurance company paid into Court the sum of \$730.33.

The Ontario Mutual Life Assurance Company (now the Mutual Life Assurance Company of Canada) issued two policies on Fenwick's life: one, No. 32248, on the 24th June, 1895, for \$3,000, payable on its face to "Alice E., wife of the assured;" and the other, No. 34458, on the 7th October, 1896, for \$2,000, payable on its face "to the executors, administrators, or assigns of the assured." On the 6th July, 1906, shortly before he went to the insane asylum, Fenwick signed a declaration under the provisions of the Ontario Insurance Act that the policy should

thenceforth be "for the benefit of my wife Alice E. Fenwick." After his admission to the asylum, the premiums on these policies were paid until 1912 by his wife, and afterwards, as the plaintiffs allege, by Mrs. Lumsden, until Fenwick's death.

The remaining two policies were in the Ancient Order of United Workmen, No. 35920 for \$2,000, dated the 25th January, 1895, and in the Canadian Order of Foresters, No. 41229 for \$1,000, dated the 20th March, 1898, each payable on its face to Alice E. Fenwick, the wife of the insured. After Fenwick went to the asylum in 1906, the premiums were kept up for some time by Mrs. Fenwick, and then, until his death, by Mrs. Lumsden.

While the plaintiff company, as the executor of Mrs. Fenwick's will, claims to be entitled to all the insurance moneys under the Sun Life policy, by reason of the absolute assignment to Mrs. Fenwick, the claims of the plaintiffs to the insurance moneys payable under the 4 other policies are limited to the amounts which the late Mrs. Fenwick and Mrs. Lumsden respectively paid by way of premiums thereon.

Dealing first with the claim by the estate of Mrs. Fenwick to the proceeds of the Sun Life policy, the defendant takes the ground that the assignment in favour of the wife of the insured stands in no different position from a declaration, either in the policy or by separate instrument, that the wife shall be the beneficiary, and is subject to be varied in favour of other members of the class of preferred beneficiaries under the Ontario Insurance Act, R.S.O. 1914, ch. 183, and is of no avail under sub-sec. 7 of sec. 178 of the Act if the wife should predecease the husband. The assignment to Alice E. Fenwick reads as follows:—

"For value received, I hereby assign, transfer, appropriate, and set over all my right, title, and interest in policy number 8265 issued on the life of myself of Belleville by the Sun Life Assurance Company of Canada to my wife Alice E. Fenwick of Belleville.

"Dated at Toronto, this 28th day of January, 1890.

"R. H. Fenwick."

And it bears the stamp "Sun Life Assurance Co. of Canada, Jan. 29, 1890," indicating its receipt by the company the day after its execution.

Section 171 of the Insurance Act, which deals with the insurable interest which a man has in his own life, also provides for the designation of beneficiaries either by the contract of insurance or by separate instrument in writing, and for the alteration or revocation of the benefits, except in cases of beneficiaries for value and of "preferred beneficiaries" (sub-sec. 3), and sub-

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sec. 8 provides that "nothing in this Act shall restrict or interfere with the right to effect or assign a policy in any other manner allowed by law." That the insured cannot revoke or alter an assignment for value to one who does not belong to those who by sec. 178 are constituted a class of "preferred beneficiaries" may be taken for granted. And where value has in fact been given the Courts will not look for defects in the instrument whereby the assignment is made, if it can be construed as giving an equitable right as against the estate of the insured or his creditors: *Thomson & Avery v. Macdonnell* (1906), 13 O.L.R. 653. And the mere fact that the assignee for value belongs to the preferred class does not affect the assignee's position, or enable the insured to transfer the benefit of the insurance to some other member of the preferred class. The assignee in such case comes under the provisions of sec. 171 and not of sec. 178: *Book v. Book* (1901), 1 O.L.R. 86. I do not think that the provision of sub-sec. 7 of sec. 171, that "a beneficiary shall be deemed to be a beneficiary for value only when he is expressly stated to be so in the contract or in an endorsement thereon signed by the assured," can apply to the case of an absolute assignment of the policy for value, in view of sub-sec. 8. It may even be that an insured can by an absolute assignment by way of gift vest the policy in another person, and so deprive himself of all power to revoke or vary the assignment; and, if so, it would seem to be immaterial whether the donee of the policy is a stranger having no insurable interest in the life of the insured, or is a member of the preferred class. See *Fortescue v. Barnett* (1834), 3 My. & K. 36; *In re Williams*, [1917] 1 Ch. 1. But it is not necessary, in my view, to decide this last point here, if the assignment to Mrs. Fenwick can be regarded as having been made for value.

Mr. Fleming argues that the words "for value received" really mean nothing, and that the assignment must be regarded as a voluntary act, and so be treated merely as a declaration in favour of the wife under sec. 178. Without admitting that, even if voluntary, an absolute assignment of a policy by way of gift may not, as already suggested, deprive the insured of all further power to deal with the policy, I am unable to agree with Mr. Fleming's contention that the words "for value received" are to be ignored merely because the assignment is in favour of the wife. In a contest with creditors seeking to set aside such an assignment as voluntary, it might perhaps be necessary to shew that value had in fact been given; but when the issue is between the assignee and the estate of the insured, the estate must be bound by the language which the insured himself used. Whether or not evidence would be admitted at the instance of the estate

to shew that no value was in fact given by the wife, I do not decide. In the absence of any such evidence, the proper inference to be drawn is that the words used by the insured mean what they say and are not to be treated as of no effect whatever. I hold therefore that Mrs. Fenwick was an assignee for value of the Sun Life policy, and that upon her death, even during her husband's lifetime, her title to the policy passed to her legal personal representatives as part of her estate.

The next issues to be dealt with are those arising upon the claims of the plaintiffs to recover the insurance premiums. These claims are founded upon an alleged lien or charge upon the policies and their proceeds, arising out of the circumstances under which the payments were made. If in fact the payments were made with the moneys of Mrs. Fenwick and of Mrs. Lumsden respectively, and those payments kept the policies alive for the benefit of Fenwick's estate, then it might seem at first blush that upon some principle of equity they should be entitled to repayment. This view will, however, when examined, be found to be grounded upon some principle of salvage, analogous to that of salvage in maritime law, but it is clear on authority that no such principle is applicable under English law where a mere stranger chooses to keep alive an insurance policy by paying premiums out of his own pocket. "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be enforced upon people behind their backs any more than you can confer a benefit upon a man against his will:" Bowen, L.J., in *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, at p. 248. That case and the earlier one of *In re Leslie* (1883), 23 Ch. D. 552, contain a very full exposition of the law governing this question, and in the *Leslie* case, Fry, L.J., gives four cases in which a person who is not the beneficial owner, but who pays the premiums to keep up a policy of life insurance, is entitled to a lien: (1) by contract with the beneficial owner; (2) by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (3) by subrogation to their right of some person who, at the request of trustees, has advanced money for the preservation of the property; (4) by reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property; and it was further held in that case that in no other cases can a lien on a policy for premiums paid be acquired either by a stranger

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or by a part owner of the policy. These cases were followed in *In re Earl of Winchelsea's Policy Trusts* (1888), 39 Ch. D. 168; but in *Strutt v. Tippet* (1890), 62 L.T.R. 475, Lindley, L.J., said that he was doubtful if the propositions of Fry, L.J., in the *Leslie* case were exhaustive, and suggested that there might be a lien where the owner of an onerous property (such as a policy of life insurance which requires the payment of premiums to keep it alive), who has agreed with another to pay the premiums, makes default, and the other person pays them. In *Re Walker*, (1893), 68 L.T.R. 517, Kekewich, J., upheld a lien upon equitable grounds which border very closely upon the principle of salvage, though he puts it upon the ground that the person making the payments was the agent of the insured.

One of the difficulties in the present case is that Mrs. Fenwick is dead, so that whatever evidence she might have been able to give of any agreement or arrangement between her husband and herself as to the payment of the premiums, is lost. Mrs. Lumsden says, however, that in the letters which Mrs. Fenwick received from her husband from time to time, and which Mrs. Fenwick shewed her, he frequently told his wife not to neglect his insurance premiums. These letters were not produced, having doubtless long since disappeared or been destroyed. But I see no reason to doubt Mrs. Lumsden's statement. Her husband, Thomas H. Lumsden, also swears that Mrs. Fenwick shewed him many of Fenwick's letters, and that in them he insisted upon her keeping up the policies, and that this was reiterated.

I desire for the present to disregard the contention of the defendant that the moneys paid by Mrs. Fenwick were not her own but were those of her husband. Assuming that the payments were made with her own money, were the circumstances such as to entitle her to a lien upon the policies? The policies were in her possession, and she, being the sole beneficiary, would become entitled to the insurance moneys if she should survive her husband and he should not have revoked or varied the declarations already existing in her favour. She had therefore an interest in keeping the policies in force. The interest was of course only a contingent one, because she might not survive her husband, or he might deprive her of all benefit by revoking or varying the declaration. The mere fact that a man insures his life for his wife's benefit, in the absence of some other obligation to her to do so, does not involve any obligation on his part to keep the insurance alive. If the beneficiary sees fit to continue the payments of the premiums upon his failure to do so, her act must, under the authorities, be regarded as a purely voluntary

one, intended either to protect her own interest in the policy, or even perhaps to protect her husband's. Logically there is no reason why the voluntary payment by a wife of premiums upon a policy of insurance upon a husband's life should not be assumed to be for the benefit of his estate. Nor if, under such circumstances, she is to be given a lien upon the insurance moneys for the premiums paid by her, would there seem to be any reason why, if the husband pays the premiums upon insurance for his wife's benefit, and she survives him, his estate should not be entitled to claim a lien upon the insurance moneys for the premiums which he had paid. I think the cases to which I have already referred, and especially *In re Leslie*, 23 Ch. D. 552, at p. 563, make it clear that one who has an interest in the policy is in no higher position than a stranger who pays the premiums. The fact that she has an interest ought really to place her in a lower position, for in her case the payments, if voluntary, are presumably to protect her own interest.

Now the only ground upon which Mrs. Fenwick could possibly be entitled to a lien for the premiums which she paid would be the first one given by Fry, L.J., in the *Leslie* case, namely, by contract with the beneficial owner of the policy. The term "beneficial owner" used in the *Leslie* case might perhaps be confused with the term "beneficiary" which the Legislature uses to describe a person to whom the insurance moneys are made payable, but they are not to be confused. The "beneficial owner" is he who "owns" the policy, the one with whom the insurer has contracted, or his assignee, and to whose legal personal representatives passes the right to enforce the contract. Mrs. Fenwick was not the beneficial owner in any such sense as that. In the *Leslie* case the claim to a lien was set up by the executor of the husband who had predeceased the wife, on the ground that he was jointly interested with her in a policy upon her life, which would have enured to his benefit had he survived her. There is no substantial difference between the *Leslie* case and this in that respect, and there the claim to a lien was not upheld by the Court.

Unless, therefore, it can be established that Mrs. Fenwick paid the premiums by some agreement with her husband entitling her to a lien, her estate cannot succeed. The only foundation for holding that there was such an agreement is the evidence that he had requested her to see that the premiums were paid, or, as Mr. Lumsden put it, had insisted that they be paid, and it is argued that such a request or demand, when acted upon, constitutes a contract. But, if so, what is the contract? Can it amount to more than an obligation to repay the money, as hav-

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ing been paid at the request and on behalf of the other, that is, for moneys paid for the use of another? I cannot see how, without more, such an obligation carries with it any lien in respect of the subject-matter of the payment. No one would seriously suggest that if at the request of a tenant I pay an instalment of rent for him, though I may be entitled to sue him for the recovery of the money paid, I acquire any lien upon his leasehold interest. It may be that very slight circumstances would be seized upon by the Court as sufficient to infer as a term of the agreement a right to assert a lien by the person paying the premiums; but, as I read the authorities, the agreement referred to by Fry, L.J., in the *Leslie* case must be not merely an agreement involving an obligation to repay the moneys but an agreement to create or give the lien. It is true there are some expressions in the judgments in *Falcke v. Scottish Imperial Insurance Co.*, 34 Ch.D. 234, which might indicate that a lien might arise as an incident of the mere contract to repay, but I can find no authority for any such general principle. Cases where the expenditure of money to preserve something at the request of another has given rise to a lien upon the thing preserved, will be found to depend, I think, largely upon the possession by the person asserting the lien of the thing benefited, and it may be that the request by the insured to a stranger, who at the time had the policies in his possession, to pay the premiums, might, by inference, entitle the other to a lien.

In the present case, I cannot, in view of the relationship of the parties, regard the requests which Fenwick made to his wife to see that the premiums were paid as in reality made with any idea of contract in his mind. They were the natural requests made by a man in his condition of health, to his wife, to see that the policies were kept up for her own protection. And I can hardly regard her payments as having been made with any other view in her mind. Nor do I think that the possession of the policies under such circumstances really improved her position. Mere possession of the policies could not make what took place a contract, if there was no contract. I am therefore driven to the conclusion that there was no agreement between them, and that consequently her executors have not established any lien for the moneys paid by her or any right to recover them out of his estate.

In this connection, I think it proper to point out that, while unable to assert any lien upon the insurance moneys or to recover the premiums paid, by way of any direct claim against the estate or the proceeds of the policies, yet if Mrs. Fenwick or her estate were required to account to her husband or his

estate for moneys or property of his in her hands, she or her estate might perhaps, on some such principle as is set forth by Lord Macnaghten in *Peruvian Guano Co. v. Dreyfus Bros & Co.* (1887), reported in a foot-note to a later decision in the same case, [1892] A.C. 166, 170, at p. 174, be entitled to bring the payments into account and deduct them from any sums otherwise owing to him or his estate. That judgment raises a very interesting question, and it may be that the right to deduct the moneys expended, if it exists at all, would be limited to the particular subject-matters for which an accounting had to be made, which in the present case would exclude the moneys expended for premiums.

Then, is the claim of Mrs. Lumsden in any different position from that of Mrs. Fenwick? Mrs. Lumsden says that, when Mrs. Fenwick was no longer able to pay the premiums, about the year 1912, Mrs. Fenwick asked her to continue the payments. At first these payments were made through Mrs. Fenwick, that is, Mrs. Fenwick would shew her the notices which came in from the insurance companies and she would then hand Mrs. Fenwick the money with which to make the payments. Later Mrs. Fenwick had a paralytic stroke, and Mrs. Lumsden then sent the moneys to the companies direct. She admitted that by keeping up the payments she expected to get the benefit of the policies. Mr. Lumsden says that frequently when the moneys were advanced for the payment of premiums, Mrs. Fenwick would hand him the policies as security, but he admits that they were returned to her from time to time, so that the security, if any, which the delivery of the policies afforded was not very substantial. During the whole time that Mrs. Fenwick lived with them, from about 1910 until her death in 1917, her slender means were not sufficient, after providing for her husband's maintenance, to provide for her wants, and Mr. and Mrs. Lumsden spent several thousand dollars in maintaining her in their house. It was natural that any documents or securities which Mrs. Fenwick had should have been placed in Mr. Lumsden's safe, and I cannot believe that the pledging of the policies by Mrs. Fenwick was very real. But, assuming that there was a deliberate pledging of the policies as security for the moneys advanced to pay the premiums, Mrs. Lumsden cannot stand in any higher position than Mrs. Fenwick herself. The claim is not based upon any alleged agency of Mrs. Fenwick for her husband, and, if it were, there is no evidence to establish that she was borrowing the money on his behalf. The moneys were really lent to her or paid on her behalf, and if I am right in holding that she acquired no lien for the premiums which she paid herself, then it follows

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that she could not by borrowing money for the purpose place the lender in any better position than her own, even by a deliberate pledging of the policies. The pledge would be, at most, a pledge of her own contingent interest.

The advances which Mrs. Lumsden made on her sister's behalf for the payment of premiums do not differ from any other advances made to her or on her account. They were either gifts or loans made to assist her. I must hold, therefore, that Mrs. Lumsden's claim to recover the premiums cannot be sustained.

The defendant by way of counterclaim asks for a declaration that Mrs. Fenwick converted her husband's properties to her own use, and for an account. Mr. and Mrs. Fenwick are both dead, and it is obvious that it is practically impossible under the circumstances to get the true state of facts as to the ownership of the assets in question. There are, however, certain outstanding facts which are of some assistance. Fenwick was without means when he married, and all through his life seems to have been in financial difficulties. His wife received some money, said to have been about \$5,000, from her first husband, from whom she had procured a divorce. She also came into a few thousand dollars from her father's estate. The house in Belleville, when purchased, was placed in her name. Shortly before Mr. Fenwick went into the asylum, he had a margin account with a firm of brokers in Toronto, who were carrying certain shares for him. On his instructions this account was transferred to her, she assuming all the liabilities connected with it. All his insurance policies either already belonged or were payable to her. He seems to have divested himself of everything in her favour, though there is no direct evidence as to the furniture and some of his jewelry and other similar things. It is argued, and it may possibly have been the fact, that the transfer of his assets to her was really in trust, to enable her the more easily to deal with them by reason of his condition; but it is just as reasonable to infer that he intended to give her everything so that in the event of his death it would be hers, he trusting that she would see to his maintenance in the asylum. There was a great deal of evidence, given with much detail, as to what had been done with the assets which he had transferred to her. She had sold the house and furniture and had realised upon the securities which had been transferred to her. To analyse that evidence is, in my judgment, useless. The burden is on the defendant to establish that the assets in question were not Mrs. Fenwick's. The evidence convinces me that they were hers, either as having been originally purchased with her money or as

having been given her by her husband, and the defendant therefore fails upon his counterclaim.

At the opening of the case, I questioned the right of the plaintiff company, as the foreign executor of Mrs. Fenwick, to maintain an action in this Province without first obtaining probate of her will here. It was then agreed that the trial should proceed, and that, if necessary, this defect in the plaintiff company's status might be remedied before the entry of any judgment which might be pronounced in its favour.

That a foreign executor cannot come into Ontario and sue for the recovery of moneys due the testator's estate without first obtaining probate here is too well-established for argument. See *Whyte v. Rose* (1842), 3 Q.B. 493, at p. 509; *New York Breweries Co. Limited v. Attorney-General*, [1899] A.C. 62. There are certain statutory exceptions to this rule: see, for example, secs. 51 and 97 of the (Dominion of Canada) Bank Act, 3 & 4 Geo. V. ch. 9. The provisions of sec. 177 of the Ontario Insurance Act, which make it lawful in certain cases to pay the insurance moneys to a foreign executor or administrator, might at first seem applicable to cases where the insurance money is payable to the representatives of a person to whom the insured has assigned the policy. But a careful consideration of the section and of the usual wording of insurance policies will make it clear, I think, that the section refers only to the legal personal representatives of the insured himself and not of other persons. Policies frequently provide for payment on the death of the insured to his legal personal representatives. The insurance moneys become payable to the legal personal representatives by virtue of the contract of insurance itself; and, while the moneys come to them as part of the estate, their right to recover the insurance money, while in one sense a representative one, is in another sense given to them by the contract, and there is, consequently, a logical foundation for legislative recognition of the claim of a foreign executor or administrator of an insured who dies domiciled abroad to be paid without first obtaining probate or letters of administration here. But, while a policy may provide for payment, or be assigned, to some person other than the insured, or to such person's legal representatives, the addition of this last mentioned alternative is really mere surplusage. The words are really words of limitation added to make more certain the completeness of the absolute gift or assignment. In such cases the legal personal representative becomes entitled in a representative capacity solely. In my opinion, sec. 177 has no application in such a case and does not warrant payment to a foreign executor. Nor does the fact that the moneys are in Court

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justify the Court in ordering payment out to a foreign executor, who could not otherwise obtain payment without first proving the will here. It will therefore be necessary for the Fidelity Trust Company to obtain probate in Ontario before this judgment can be entered. If, in applying for probate here, it becomes necessary or more convenient to obtain a grant of administration with the will annexed to some other person or corporation, there will be leave to amend by the substitution or addition of the Ontario administrator.

There will therefore be judgment:—

(1) Declaring that the estate of the late Alice E. Fenwick is entitled to be paid the proceeds of the Sun Life policy, now in Court, amounting to \$730.33, with the Court interest thereon, and to recover against the defendant their costs of this action, including the costs of the motion before Mr. Justice Kelly pursuant to his order of the 26th September, 1919.

(2) Declaring that the plaintiffs have failed to establish any lien upon the insurance moneys for the premiums paid by the late Alice E. Fenwick or by the plaintiff Carrie Louise Lumsden, or any right to recover against the estate of the late Robert H. Fenwick in respect thereof.

(3) Dismissing the counterclaim with costs.

(4) The defendant will be entitled to indemnify himself out of Robert H. Fenwick's estate for the costs which he is by this judgment called upon to pay, and also to be paid his own costs as between solicitor and client out of the estate.

This judgment is not to be entered until the probate of Alice E. Fenwick's will, or letters of administration with the said will annexed, have been obtained in this Province; the plaintiffs to be at liberty to amend, if necessary, by adding or substituting the Ontario executor or administrator as a plaintiff in this action and by inserting the proper allegations in that regard in the statement of claim.

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Judgment—Motion to Set aside Judgment Entered after Trial—Forum—Judge of High Court Division Sitting as Court—Rule 523—Grounds Arising after Judgment—Action Brought upon Judgment in Supreme Court of New Brunswick—Different Result—Findings of Jury—Law of New Brunswick—Ontario Action Defended but Defendants not Appearing at Trial.

This action was brought in the Supreme Court of Ontario against the defendants, as a partnership, for damages for breach of contract; the defendants were served with the writ of summons in the Province of Quebec, where they carried on business; they entered an appearance, delivered a statement of defence, and were served with notice of trial, but they did not attend at the trial; the trial took place in the regular way before a Judge without a jury, and judgment was entered for the plaintiffs for a sum of money and costs. Nearly two years afterwards, an action upon this judgment was brought in the Supreme Court of New Brunswick, and was tried with a jury. According to the law of New Brunswick, as it appeared, the Ontario judgment was not binding in New Brunswick because the defendants—a co-partnership firm—had not been “personally served” with the writ. Upon the findings of the New Brunswick jury, the trial Judge considered that the plaintiffs could not recover damages, but he gave judgment in their favour for the costs awarded by the Ontario judgment. As to those costs the defendants appealed successfully to the New Brunswick Court of Appeal:—

Held, that, if a Judge of the High Court Division of Ontario, sitting as the Court, had power to reverse the judgment given at the trial and dismiss the action upon grounds arising after that judgment—see Rule 523—there was no good ground for exercising the power in this case.

That a New Brunswick jury, probably on different evidence, reached a different conclusion from that of the Judge at the trial of this action, and that the Judge at the trial in New Brunswick considered that the jury’s finding precluded a recovery of damages for breach of the contract, did not afford a reason for reversing the judgment in this action.

MOTION by the defendants, under Rule 523, to set aside a judgment entered after a trial by a Judge without a jury, at which the defendants did not attend and were not represented. The judgment was in favour of the plaintiffs for the recovery of \$2,275 and interest and costs.

Rule 523 reads as follows:—

“A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further

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or other relief than that originally awarded, may move in the action for the relief claimed.”

July 21. The motion was heard by MEREDITH, C.J.C.P., in Vacation Court, Toronto.

W. A. Skeans, for the defendants.

W. R. Meredith, for the plaintiffs.

August 4. MEREDITH, C.J.C.P.:—This case is a striking instance of one of the few inconsistencies, if I may not say eccentricities, of the law, or of its administration.

The defendants, apparently a co-partnership firm, were sued as such, in this Court, in May, 1918. The business of the firm, in respect of the matters in question in the action, was carried on at Montreal. The proceedings in the action seem to have been quite regular in all respects. The defendants were served with the writ at Montreal: and in due course entered an appearance to the writ by their solicitors: the plaintiffs' statement of claim was delivered, as was the defendants' statement of defence; and a joinder of issue was added and notice of trial given—admission of service of it by the defendants' solicitors in writing being endorsed upon it.

The action then came regularly on for trial, but the defendants did not attend, and the trial took place in the usual and regular way before a capable and careful Judge, who, upon the evidence adduced before him, directed that judgment be entered for the plaintiffs and \$2,275, and interest at 5 per cent. from the 14th day of May, 1918, damages, with costs of action: and soon afterwards judgment was duly entered accordingly.

It was said, during the argument of this motion, that an application for a new trial was made by the defendants, and that, as I understood the statement, a new trial was granted on terms which the defendants would not comply with, and so the judgment stood and still stands in full force and virtue. Evidence of these things was requested, but has not been furnished: the industry of the solicitors may perhaps have been affected by the inclemency of the weather. It would have been better to have had that evidence, and a good deal more, as to other circumstances, that has not been furnished; but it is not essential; and, the parties having had ample time to furnish it, the motion shall not be longer delayed on that account.

The plaintiffs being unable to realise upon the judgment, because the defendants apparently had no exigible property in this Province, steps were taken with a view to enforcing it in the

Province of New Brunswick, where, it is said, the defendants have such property.

An action, upon the Ontario judgment, was brought in the Supreme Court of New Brunswick, apparently several years after the judgment in Ontario was obtained, but none of the papers before me shew directly or inferentially when: the only information supplied, as to the proceedings in New Brunswick, is that which the reasons for judgment in the Court of Appeal of that Province, in the action upon the judgment, afford.

The case there is said to have been tried, with a jury, in March, 1920; and it is said that upon that trial the jury found that the market price of the goods sold to the defendants by the plaintiffs was, at the time when the defendants should have taken delivery of them, the same as the price at which they had agreed to buy. That seems to have been the only question of fact which was tried: and upon that finding the trial Judge seems to have considered that the plaintiffs could not recover upon the contract, but he gave judgment for them in the amount of the costs awarded to them in the Ontario judgment.

Why the plaintiffs could recover nothing, for the defendants' apparently admitted breach of contract, does not appear. There must have been nominal damages; and there must have been actual damages by reason of the delay and of the plaintiffs being obliged to go into the market again and sell and again make preparations for delivery.

The plaintiffs do not appear to have appealed or cross-appealed against the judgment upon this trial; but the defendants appealed against that part of it which awarded to the plaintiffs the costs of the Ontario action.

The defendants succeeded upon that appeal.

The learned Chief Justice of the King's Bench, a member of the New Brunswick Court of Appeal, in stating the reasons for the judgment of that Court, went at length into many circumstances more or less bearing upon the question that Court had to consider; and I am much more indebted to him, than to the solicitors in this application, for such information as I have, material upon this motion.

From those reasons I gather that, although the writ of summons in the Ontario action was served upon the defendants at that firm's place of business in Montreal; and although it at once came to the hands of Harry I. Garson, who seems to be the firm or the major part of it, as he is described by the Chief Justice as the appellant in the appeal in the New Brunswick Court; and although he retained Ontario solicitors to defend the Ontario action; and although they duly entered an appearance in that

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action for the defendants; and although they were parties to bringing the action duly down to trial; the Ontario judgment was not binding in New Brunswick because the defendants—a co-partnership firm—had not been “personally served” with the writ.

Although that learned Judge fell into the error of saying that the Ontario action “came to trial as an undefended action;” when in truth it was brought on for trial, and was tried, as a defended action; due notice of trial having been given and accepted: and although that mistake is accentuated by a subsequent statement of the Chief Justice that this case and a case in England of *Gavin Gibson & Co. Limited v. Gibson*, [1913] 3 K.B. 379, were in all material particulars identical, though in that case there was no acknowledgment of jurisdiction and there was a complete ignoring of the Victoria Court’s process and proceedings, whilst there was in this case the fullest acknowledgment of jurisdiction and compliance with and taking part in the process and proceedings of the Ontario Court, so that if there had been no jurisdiction originally there was complete attornment to the jurisdiction: it must be taken as the law of New Brunswick that no such judgment as that of this Court has any weight or recognition in that Province: and, that being so, it cannot be out of place to suggest to those who make the laws of New Brunswick that its law in this respect may need reconsideration.

For look at that which it may lead to: a defendant personally served—whatever may be meant by that, and I may add that it does seem to me that where the writ comes to the hands of the defendant and he reads and understands and retains a solicitor to defend the action of which it is the commencement, a pretty effectual personal service has been effected—is bound though he ignore the proceedings altogether; but is not bound, if not “personally served,” though he defend the action and even carry it to the Supreme Court of Canada and have it there decided against him: and may, when sued in New Brunswick, defend upon the merits and not only win there but win in the Supreme Court of Canada if the case be carried there by his opponent or by him; and so have that Court stultify itself.

That which I am asked to do on this motion is: set aside the judgment in the Ontario action and dismiss that action, because, and solely because, a jury in a New Brunswick case reached a conclusion different from that reached by a Supreme Court Judge of this Province on probably different evidence: because, and solely because, a New Brunswick jury found that the market price of the goods sold was the same at the time of the breach as

the price agreed to be paid, and a single Judge at *nisi prius* in New Brunswick considered that that finding precluded a recovery of damages for the breach of the contract.

It may be that, even sitting here, I have power to make the order asked for—reverse the judgment in question and dismiss the action upon grounds arising subsequent to it: see Rule 523: but I can perceive no good ground upon which that can be done.

Giving the fullest weight to the proceedings in the New Brunswick Courts, why should the conclusion reached there be preferred to that reached here? The trial there was long after the breach of the contract: the trial here was soon after: the evidence adduced at the trial here may have been, and probably was, very different, in the plaintiffs' behalf, from that adduced at the trial there years after the making and breach of the contract; and hundreds of miles away from the place where the plaintiffs reside and from the place where the contract was made.

The defendants' absence from the trial here after taking a defendant's full part in bringing the case down to trial here, was his own doing, and ought not now to be treated as something worthy of a reward—a dismissal of the action and a nullification of the judgment of this Court which stands, and has so long stood, against him.

The motion is dismissed: under ordinary circumstances it should be dismissed with costs: but, as it has been presented, on both sides, in such a naked manner as ought to meet with some disapproval, notwithstanding the heat of the weather, it will be dismissed with costs fixed at \$20.

The defendants appealed from the order of MEREDITH, C.J.C.P.

January 24, 1922. The appeal was heard by MULOCK, C.J. Ex., SUTHERLAND, KELLY, MASTEN, and ROSE, JJ.

William Proudfoot, K.C., for the appellants.

W. R. Meredith, for the plaintiffs, respondents.

THE COURT, after hearing counsel, dismissed the appeal with costs.

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CANADIAN BANK OF COMMERCE V. PATRICIA SYNDICATE.

Partnership—Promissory Notes Made by Trustee for Syndicate and Discounted by Bank—Advances Made for Purpose of Mining Operations—Liability of Defendant as Member of Syndicate and Partner of Trustee—Absence of Express Agreement—Separate Entity Called "Syndicate"—Existence of—Evidence—Joint Business Carried on by two Persons—Agreement for Division of Shares in Company to be Formed—Profits—"Net Profits"—Participation.

Certain promissory notes signed by one O'C., with the words "trustee Patricia Syndicate" after his signature, were discounted by the plaintiff bank, and this action was brought to recover the aggregate amount of the notes from the defendant R., the bank contending that "Patricia Syndicate" was the name of a partnership, of which the partners were R. and O'C.:—

Held, that, although there was no agreement, in so many words, that R. should be a member of the syndicate, the acquisition by him of a half-interest in the business known as the "Patricia Syndicate" was established, and also the recognition of the syndicate as a separate entity from the existence of the members of it; and, upon the evidence, taken as a whole, there existed that separate entity, and R. and O'C. were the members of it, and the relationship between the two was that of partnership.

O'C. had an option for the acquisition of a mining property, with the right to operate during the currency of the option, and the notes were given to secure advances made by the bank to enable O'C. to carry on operations. It was agreed that the property, if acquired pursuant to the option, was to be turned over to a company, to be formed, for shares which were to be divided between R. and O'C.; and, while those shares would not have been "net profits," they might be called "profits" in the sense in which the expression is used in *Mollwo March & Co. v. Court of Wards* (1872), L.R. 4 P.C. 419, 436.

Cases, on the one hand, such as the *Mollwo* case, in which the supposed partner was really a lender and if he participated in profits it was as a consideration for having made the loan, and cases, on the other hand, such as *Ex p. Delhasse* (1878), 7 Ch. D. 511, where the supposed partner was to participate in the net profits, distinguished. Review of the authorities.

ACTION against the Patricia Syndicate and Sir Charles Ross, Bart., upon certain promissory notes.

The action was tried by ROSE, J., without a jury, at a Toronto sittings.

Glyn Osler and *T. M. Mulligan*, for the plaintiffs.

I. F. Hellmuth, K.C., and *A. G. Hill*, for the defendant Ross.

Judgment had been entered by the plaintiffs against the Patricia Syndicate upon default of appearance.

August 9. ROSE, J.:—The question for determination in

this case is whether Sir Charles Ross, Bart., is liable to the plaintiff bank upon certain promissory notes signed "C. A. O'Connell, trustee Patricia Syndicate," and discounted by the bank. The contention of the bank is, that "Patricia Syndicate" was the name of a partnership, of which the partners were Sir Charles Ross and Mr. O'Connell. Judgment has gone against the "Syndicate" by default: Mr. O'Connell died before the action was commenced.

By an agreement, dated the 20th July, 1917, and made between the owners of certain mining claims and Mr. O'Connell), the owners granted to Mr. O'Connell the option of acquiring the claims upon the terms set forth in the agreement, which were, shortly, that O'Connell should pay, for an undivided five-sixths interest in the claims, the sum of \$125,000, of which \$2,000 was to be paid forthwith and the remainder in instalments, the last instalment being payable on or before the 20th August, 1919; that he should, not later than the 15th August, 1917, commence mining operations upon the claims, and should in those operations spend not less than \$1,500 a month during the currency of the option; that, if he acquired the five-sixths interest, he should incorporate a company having an authorised capital stock of \$2,000,000, and should turn over the properties to the company for \$1,250,000 in shares at par (leaving in the treasury of the company shares of the par value of \$750,000), and should, out of the \$1,250,000 in shares, transfer to the owners of the claims, for the remaining one-sixth interest, shares of the par value of \$208,333; that he should have the right to immediate possession of the claims and to ship and sell ore, but the proceeds of the sales of ore, after deducting the costs of freight, treatment and smelting, were to be paid from time to time to the owners of the claims on account of the purchase-price of the five-sixths interest; that time should be the essence of the agreement; that the making of any one payment or the commencing of operations should not obligate O'Connell to make further payments; that failure to pay any instalment or to spend the stipulated amounts in development work should put an end to the option; and that upon the termination of the option all moneys theretofore paid to the owners should belong to them as the consideration for the giving of the option.

Mr. O'Connell was on very friendly terms with Sir Charles Ross, and telegraphed to the latter, telling him that he had a mining proposition that looked very attractive, and asking whether he would put up \$2,000 to "tie things up." Sir Charles Ross telegraphed that he would do so; and he did give O'Connell the \$2,000. Then the two met, and O'Connell shewed the option to

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Sir Charles, and asked him whether he would join him in the venture, and take a certain interest in the property, informing him that possibly there would be needed for development work and for payment of the instalments, before money was available from the proceeds of the ore shipped, about \$100,000. Sir Charles Ross said that he would put up \$100,000 (which was to include the \$2,000 already paid).

This interview apparently took place about the 14th August, 1917, and on that day Mr. O'Connell gave a receipt for \$27,000 "on account of Boston Hollinger mining claims operation," saying that this sum was made up of \$2,000 paid on the 20th July, and \$25,000 paid on the 14th August. (Boston Hollinger was the name by which the mining claims were known).

It was understood that a document should be prepared setting forth the agreement between Sir Charles Ross and Mr. O'Connell, but the document was not prepared for some time thereafter, the delay, apparently, having been on the part rather of Sir Charles Ross's solicitor in Quebec than on the part of either of the parties to the agreement. When the document was finally prepared by an attorney in New York, it did not seem to Sir Charles Ross to set forth the agreement correctly. It was, however, executed; but a short time afterwards, and after the attorney had seen the papers and correspondence, a new agreement was drawn and executed. These two agreements will be referred to more particularly later on.

I think that, in general outline, Sir Charles Ross's plan was to venture such moneys as might be needed up to \$100,000 for the purposes mentioned, and, if the venture proved a success, to take the major part of the shares that would remain out of the shares of the par value of \$1,230,000 to be issued by the proposed company as the consideration for the transfer to it of the property, after deducting the \$208,333 in shares which were to go to the owners of the property. If the venture did not turn out successfully and if the company was not formed, or if the company was formed and the shares proved worthless, the \$100,000 would be lost, but if things turned out as it was hoped they would Sir Charles Ross would have his shares and would make whatever he could make by holding or selling them. I do not think that it occurred to him that the relationship between himself and Mr. O'Connell could be the relationship of partnership or such a relationship as would make him responsible for obligations which might be incurred by Mr. O'Connell in the mining operations; but, after a lengthy consideration of the documents the correspondence, and the evidence of Sir Charles Ross, I have

come to the conclusion that for such acts of Mr. O'Connell as are in question in this action Sir Charles is responsible.

Immediately after he had received the \$25,000 which has been mentioned, Mr. O'Connell proceeded to commence operations. On the 24th August, 1917, he wrote to Sir Charles Ross that upon his arrival at Cobalt he had opened an account with the Canadian Bank of Commerce in the name of "Patricia Syndicate, C. A. O'Connell, manager," and had told the local manager of the bank that advances might be wanted on ore shipped to smelters.

From that time on, Mr. O'Connell continued to report regularly to Sir Charles Ross as to the progress that he was making and as to the prospects of success. Once or twice he asked whether the agreement had been got ready for signature. When he needed money he asked Sir Charles Ross for it, and it was supplied, and—notably on the 30th November, 1917—he informed Sir Charles Ross that a cheque received from him had been deposited in the Canadian Bank of Commerce to the credit of the Patricia Syndicate. On the 8th January, 1918, he wrote referring to an interview that he and Sir Charles Ross had had with the President of the Bank of Commerce at Toronto, but there is no evidence as to what had gone on at that interview.

On the 18th January, 1918, Sir Charles Ross wrote one of the few letters written by him which are in evidence. In it he said: "The only policy to pursue is to get our ore above ground. Under existing conditions this appears to be the only wise and sound policy." I may pause here to remark that upon the argument a great deal of stress was laid upon expressions in letters—for instance, the expression "our ore," in the letter last referred to, and expressions in Mr. O'Connell's letters, such as that he had said to the banker. "We may want advances"—as indicating that the operations were the operations of himself and Sir Charles Ross, rather than his own individual operations, but that I do not attach much importance to these expressions, whether they are used by Mr. O'Connell or by Sir Charles Ross himself. I think that for the reasons stated by Lord Justice Cotton in *Badeley v. Consolidated Bank* (1888), 38 Ch. D. 238, at pp. 252-3, it would be unsafe to deduce from these expressions, standing alone, anything as to the real relationship of the parties. In this connection, reference may be made to a letter of the 13th June, 1918, in which there is a statement that the security to the bank for certain advances was to be "our" note, but in which there is also the statement. "We started the mill yesterday." It appears to me that this is one of several instances in which Mr. O'Connell used expressions indicative of joint action which were really meant to be statements of his individual

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action; and I think that there is not very much to be deduced from the fact that Sir Charles Ross did not, in any letter produced, complain of Mr. O'Connell's manner of expressing himself.

On the 18th January, 1918, Mr. O'Connell wrote: "I told him (the bank manager) that we intended stoping our ore and putting it in a stock pile on the surface and that we might make an application to the bank for a loan on this lot of ore before it was milled. . . . He is very keen to hold our business and I am sure that we can get what accommodation we will require." To digress again, I may observe that both Sir Charles Ross and Mr. O'Connell and the gentleman who drew the agreement between them seem to have somewhat lost sight of the fact that the ownership of the mining properties had not passed to O'Connell, and that, while under the agreement with the owners he was at liberty to get out ore and sell it, the proceeds of sales, less the costs of freight, treatment and smelting, were to go to the owners on account of the payments under the option, and that it was at least doubtful whether O'Connell could give title to the bank to any ore which he purported to pledge as security for advances.

The last mentioned letter was answered by Sir Charles Ross on the 21st January, 1918, he saying, "The big idea is to get the ore above ground and know what its worth is and how much we can cash in on it;" and on the 29th January, 1918, when he was sending another cheque for \$25,000, he said: "Try and let me have some figures . . . which will give me a good working basis of the value of the ore developed and the probable extent of it. . . . What I want to get and keep up to date is how we are coming out financially on uncovering values which can be converted into cash."

On the 4th February, 1918, Mr. O'Connell wrote that he had had a talk with the President of the Bank of Commerce which had been very satisfactory, and he said, "I feel that we will be well treated by the bank . . . if we will need any assistance from them to carry out our plans."

In March he sent what was called a trial balance as at the 1st March, 1918. In this he shewed as a debit "Syndicate \$75,000," which amount was apparently the amount that Sir Charles Ross had furnished up to that time.

The formal agreement first drawn bears date the 9th April, 1918, and was apparently executed at Ottawa on or about the day of its date. It recites that Mr. O'Connell is the recorded owner of an option upon certain mining properties "being operated in the name of Patricia Syndicate;" that he has been engaged in the development of the properties "with moneys ad-

vanced by the said Sir Charles Ross:" that the development and advancement of moneys has been under a verbal agreement and understanding as to the present and future proportionate ownership of the said properties; that it was understood and agreed under the said verbal agreement that a corporation should be formed for the development and operation of the properties (which agreement may be impossible of performance because of certain restrictions which have been placed upon the flotation of companies during the war); and it goes on to witness: (1) that Sir Charles Ross, having already advanced \$75,000, will advance a further sum of \$25,000 as and when requested by O'Connell; (2) that O'Connell will and does hereby assign, set over, and transfer to the said Sir Charles Ross, 50 per cent. of all the interest which O'Connell has or may have in and to the said option and in and to all rights he has or may have in the business so conducted in the name of the Patricia Syndicate; (3) that, should Sir Charles Ross advance moneys in excess of the \$100,000, the advance shall be "in the form of a loan to the business known as the Patricia Syndicate, and shall be repaid or secured before either of the parties draws from the said business any other sums as profits, or by way of purchase of said treasury stock, as is hereinafter provided for;" and (4) that in case a corporation shall be formed for the carrying on of the said business both of the parties shall assign "their total interests in the said Patricia Syndicate, the option, or the mining properties to the said corporation;" that the shares to be issued by the proposed company shall be held in certain proportions (the gentleman who drew the agreement seems to have lost sight of the provision in the contract between the owners of the property and Mr. O'Connell by which \$750,000 of shares were to be left in the treasury of the company). The last clause of the agreement is as follows: "(5) The purpose and intent of this agreement is to make definite the terms and conditions under which the parties hereto have been carrying on the above described business, and to carry into effect the verbal agreement to which reference has been heretofore made."

On the 13th April, 1918, Mr. O'Connell wrote reporting an interview which, upon his return to the mine, he had had with the local manager of the bank, and he said, "I told him that we might want a line of credit of \$10,000 to \$15,000 for a short time in June or July and we could give him the note of the syndicate." He also said that there were some heavy payments for machinery and supplies to be made, and that he would like the remaining \$25,000 which Sir Charles Ross was to put up, and he added, "I trust I will not have to call on you for any further funds."

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The new agreement which was to take the place of the one dated the 9th April, 1918, is dated the 2nd May, 1918, but I think there is no evidence as to exactly when it was executed. As regards the matters in question in this action, it does not seem to be very different from the agreement of the 9th April. Its recitals as to the agreement with the owners of the property are somewhat longer than, but not materially different from, the recitals in the first agreement, and it contains a recital that O'Connell has actually commenced operations on the mining claims and "is carrying on the said business under the name of the 'Patricia Syndicate,' and for that purpose has required and will require, amongst other matters and things, tools and appliances, and in order to help him in purchasing same, and in paying off the purchase of the said mining claims, has requested the party of the second part (Sir Charles Ross) to make advances to the extent of \$100,000;" and that Sir Charles Ross has made the advances, and that O'Connell, "according to the verbal agreement made when said amount was so advanced, desires to provide proper security and give reasonable remuneration to him in consideration of such advances." And it witnesses: (1) that O'Connell "will and does coincident herewith assign, set over, and transfer to the said Sir Charles Ross 50 per cent. of all the interest which the said Charles A. O'Connell has or may have in and to the said option and in and to all rights he has or may have in the business connected with the said option and the mine operated thereupon, and to all of the assets of every kind connected with the said option, the said mine, or the said business;" (2) that, should Sir Charles Ross advance any further moneys, the advance "shall be in the form of a loan to the said business and shall be repaid or secured before either of the parties hereto draw from the said business any other sums as profits, or by way of the purchase of the balance of the treasury stock as is hereinafter provided for" (which is the same thing as the corresponding clause in the former agreement, except that the words "a loan to the said business" are substituted for the words "a loan to the business known as the Patricia Syndicate"); (3) that in case the company is formed, the shares shall be divided in a certain way. (This is a confused clause, and the right of the owners of the properties to have \$75,000 in shares kept in the treasury of the company seems to have been again lost sight of). The clause contains these words: "The said Charles A. O'Connell and the said Sir Charles Ross shall both transfer to the said corporation all of their rights, title, and interest in and to the said option or to the mine, machinery, equipment, and assets connected therewith . . . The said Sir Charles Ross shall transfer his

said one-half interest in the above described properties, together with the option, to the said corporation . . . for which transfer so made (subject to a certain lien) the said Sir Charles Ross shall receive" certain shares; and there is repeated the statement contained in the agreement of the 9th April, that (4) "the purpose and intent of this agreement is to make definite the terms and conditions under which the parties hereto have been carrying on the above described business, and to carry into effect a verbal agreement to which reference has been heretofore made."

On the 18th May, 1918, Mr. O'Connell wrote that he had arranged an extension for a month of a payment under the option, which was to fall due on the 20th May, and that to complete that payment he had arranged with the Bank of Commerce to pay \$10,000 to the owners of the property, and he said, "The Bank of Commerce will give us any fair amount of credit on my personal guarantee, and your name has not been brought into the transaction." On the 23rd May, he wrote: "The manager of the Bank of Commerce is very friendly, and as he is most anxious to keep our account I am relying on him to give us such accommodation as we will require to carry us 'over the top.' This, I feel sure, he will do, and my friends from whom I am purchasing supplies, etc., have told me that we can have any reasonable time on our supplies as we will require." He also asked Sir Charles to see whether he could do anything with a certain company which had been refusing to give credit on explosives.

On the 10th June, 1918, Mr. O'Connell wrote that he was getting advances from the bank, and might have "to give the note or other security of the syndicate as security." He also said: "As I told you in Ottawa, I have not yet made known that you are the principal shareholder of the syndicate, and, provided the manager wishes to know who my partners are, may I have your permission to reveal your connection? If you consent to this, will you please wire me" (in certain words) "this only if it is asked for by the bank manager. I do this for I know full well your very large interests and their critical stage."

On the 13th June, 1918, Sir Charles Ross telegraphed giving the required authority to reveal his connection, but on the same day Mr. O'Connell telegraphed and wrote saying that it had not been necessary to disclose Sir Charles Ross's connection. He said: "The arrangement made with the manager of the Canadian Bank of Commerce is that we are to have a line of credit of from \$20,000 to \$30,000 on a 7 per cent. basis, the security being our note, backed by the bullion, concentrates and ore on the dump. We are to adjust every month . . ." (This is the letter to

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which I have already referred in which Mr. O'Connell also says, "We started the mill.")

The evidence of the manager of the bank does not quite accord with the statements made by Mr. O'Connell in the last mentioned letter, because the manager says that as soon as O'Connell began to borrow he (the manager) asked for information as to who his associates were, and that thereupon O'Connell lodged with him the agreements of the 9th April and the 2nd May, 1918, from which agreements he inferred that Sir Charles Ross and Mr. O'Connell were partners. I do not know, however, that anything really turns upon this discrepancy. The case made by the bank is not a case of acting upon any holding out by Sir Charles Ross of O'Connell as having any authority other than the authority which he actually had, and it seems to me that it does not make much difference whether the bank knew or did not know what was the real relationship between the two supposed partners. Sir Charles Ross's telegram authorised O'Connell to make known the true relationship, and there would be no more natural way of making that relationship known than by exhibiting the documents; but, whether the documents were or were not exhibited, it is the true relationship which must be ascertained, and which, when ascertained, will govern the case. It was argued that from the request to be allowed to make known the relationship, and from the permission granted to make it known, it must be inferred that the relationship to be made known was a relationship which would involve Sir Charles Ross in liability for the acts of O'Connell; but I do not think that that inference must necessarily be drawn. The bank, having under consideration the making of advances, would, of course, desire to know who were interested with O'Connell in the properties, and knowledge that Sir Charles Ross was interested to the extent of \$100,000 which he had put into the venture would be of importance to them, as indicating the probability that, rather than see the undertaking fail, he would, if necessary, put in further money to protect what he had in it already. This fact would be taken into consideration by the bank, and the fact that O'Connell asked permission to make known Sir Charles Ross's relationship to the venture does not seem to me to indicate necessarily that he was asking permission to pledge Sir Charles Ross's credit in any way. See *Dean v. Harris* (1875), 33 L.T.R. 639.

On the 13th June, Sir Charles Ross wrote confirming his telegram and saying that he had not been able to come to the mine, and also that he was going away for a holiday and was going to send to Mr. O'Connell a man who had been in his employ and whom O'Connell would find useful at the mine; he said that for

various reasons he wanted to keep this man in his employ, and that, without employment at the mine, he had not enough for him to do. Mr. O'Connell, in a later letter, expressed his willingness to have the man come. On the argument, stress was laid upon this as being an evidence of Sir Charles Ross having exercised control over the business, but it does not strike me as being very important. With the amount of money which he had in the venture, it is quite natural that he should insist upon reports, and that he should tender advice and even give instructions, and that an arrangement such as the one under discussion should be made; and, while all these things are to be taken into consideration, it seems to me that not very much weight is to be given to any one of them.

On the 18th June, 1918, Mr. O'Connell wrote repeating that he had not been asked by the manager of the bank for the names of his partners, and saying, "The accommodation was granted us on the note or notes of the syndicate with ore on the dump and in process in the mill, bullion to be produced, as well as concentrates, as security."

On the 22nd June, he wrote to the bank saying: "For your further information I have to advise you that the majority of the stock of the Patricia Syndicate is owned by Sir Charles Ross, Bart., of Quebec, and as he has had large business dealings with your bank, your head office is no doubt informed as to his financial standing."

On the 8th July, 1918, he wrote to Sir Charles Ross that he was short of funds, but he said: "If needs be we can use some of the funds at credit in the Powell township account until such time as we can get further gold from the mill. I am using every endeavour to restrict the operation so that it will be able to finance our needs and hope to be able to carry out this scheme." (The Powell township account seems to have been an account kept in the bank in connection with some venture which Mr. O'Connell and Sir Charles Ross had in that township).

On the 27th July, 1918, Mr. O'Connell wrote: "We have met the pay-rolls and pressing bills and to do this we have borrowed \$600 from the Powell township account, and I have made a loan of \$1,600 to the syndicate. To pay off our obligations to merchants, mill equipment, etc., we will need further funds. If you could make the syndicate a loan of \$15,000 to carry us over the crisis we will be able to carry on until such time as we can get on our feet. The Bank of Commerce have advanced us \$20,000 in two loans of \$15,000 and \$5,000, and under agreement with them we must at all times have a credit balance with them." On the 31st July, 1918, Sir Charles Ross, answering this letter,

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said: "I am afraid your letters do not make it quite clear to me as to just where we stand financially in respect to the returns we are getting from the ore. Will you, therefore, put all your information together and meet me in Montreal on Monday morning?" (Apparently the meeting in Montreal did not take place).

On the 1st August, 1918, Sir Charles Ross sent the \$15,000 asked for; and, treating this as one of the further advances provided for by the agreement of the 2nd May, 1918, he sent with the cheque a form of promissory note which he had prepared and which he said "should be signed by the Patricia Syndicate—by yourself." The note is:—

"On demand after date, the Patricia Syndicate promises to pay Sir Charles Ross, Bart., or order, fifteen thousand (\$15,000) dollars with interest at the rate of . . . %. Whether or not demand is made, this note shall be paid before any dividends are declared or any moneys paid either to C. A. O'Connell or Sir Charles Ross, Bart., on account of any stock interest they or either of them may have."

The notes upon which the bank sues are seven in number, the first of them being dated the 13th June, 1918, and the last the 20th December, 1918. Before the later advances were made, the bank asked Mr. O'Connell to get some guarantee from Sir Charles Ross, who was then in England, and some cablegrams passed; but on the 18th November, 1918, Sir Charles Ross cabled to O'Connell saying definitely, "I will not increase my investment." After that date there was one advance of \$3,000.

In no case which was cited by counsel, and in no reported case that I have been able to find, were the facts very much like the facts which have to be considered here. On the one hand, the cases relied upon by Mr. Hellmuth were, in the main, cases in which the supposed partner was really a lender—he had lent money to the trader which the trader was bound to repay—and if he participated in profits it was as a consideration for having made the loan; and stipulations in the agreement between him and the trader which resembled some of the stipulations frequently found in partnership articles were in reality inserted for the purpose of giving him, as lender, some more ample security for his money. I refer to such cases as *Mollwo March & Co. v. Court of Wards* (1872), L.R. 4 P.C. 419; *Dean v. Harris*, 33 L.T.R. 639; *Badeley v. Consolidated Bank*, 38 Ch. D. 238; *Holloom v. Whichelow* (1895), 64 L.J.Q.B. 170; *In re Young*, [1896] 2 Q.B. 484; with which may also be considered *Kelly v. Scott* (1880), 42 L.T.R. 827. But the present case is not a case of the same class, for here there was no loan; there was no obligation

on the part of O'Connell to repay the \$100,000 or any part of it; what Sir Charles Ross got for the \$100,000 was one-half of all O'Connell's interest in and to the option and in and to all rights he had or might have in the business connected with the option and the mine operated thereupon, and to all of the assets of every kind connected with the said option, the said mine, or the said business, together with a right to very much more than one-half of the shares that were to come to O'Connell from the company if the company was formed and the property was transferred to it.

On the other hand, the cases cited by counsel for the plaintiffs, for instance *Ex p. Delhasse* (1878), 7 Ch. D. 511, are, generally speaking, cases in which stress was laid upon the fact that the person found to be a partner was to participate in the profits of the business carried on by the ostensible trader, and these cases in turn seem to differ from the present case in that in this case Sir Charles Ross was not to participate in profits properly so called, i.e., in the "net" profits: see *Lindley on Partnership*, 8th ed., pp. 40, 41, and *Mollwo March & Co. v. Court of Wards*, L.R. 4 P.C. at p. 433. What he was to have was a large part of the gross returns, i.e., of the shares to be issued by the proposed company. No matter what might be expended by O'Connell or by the "syndicate" in developing the mine and in acquiring the title, the property was to be turned over to the proposed company for a fixed number of shares, and Sir Charles Ross was to have certain of those shares for his interest in the property turned over, so that there was not to be what is usual in a partnership business, and what was treated as one of the determining factors in most of the cases cited by counsel for the plaintiffs, namely, an ascertainment of the balance of receipts over expenditures and a division of that balance. In the same way there was not to be a sharing of losses. Sir Charles Ross was to put in his \$100,000. If the option was exercised, and if the mine was turned over to the proposed company, and if he got his agreed number of shares, well and good; but if the option was not exercised he simply lost his \$100,000 and—so far as any express agreement goes—he was not to be bound to pay more.

The case, then, being distinguishable in its facts from the cases relied upon by counsel for the parties respectively, I take it that what has to be done is to ascertain what, upon the formal contracts, the correspondence, and the evidence of the witnesses, was the real relationship between the parties, not taking any one circumstance and saying that it, by itself, raises a presumption for or against a partnership, and then asking whether there is anything to rebut that presumption, but taking everything that

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is available and ascertaining, if possible, what the true relationship was: see per Lord Justice Bowen in *Badeley v. Consolidated Bank*, 38 Ch. D. at p. 262. I shall proceed in the way indicated, and shall state what seems to me to be the result of the inquiry.

I think that, as it first presented itself to Sir Charles Ross, the scheme, in its general outline, was that he, for his \$100,000, should have a half interest in the rights conferred by the option: that O'Connell should do the requisite work, and, if the mine made good and ore to a sufficient value was obtained, should take up the option and turn the mine over to a company to be formed; and that the two of them should own, in certain proportions, the shares issued by the company as the purchase-price of the mine (less the shares going to the vendors pursuant to the option agreement), Sir Charles Ross's proportion being such as to give him control of the company; and that if, before the mine was turned over to the company, he had to provide any money additional to the \$100,000, he should do so by way of loan. I think that, in the beginning at least, he looked upon himself as one who was letting Mr. O'Connell have money, for which O'Connell was to give him shares of the company's stock if O'Connell succeeded in acquiring the mine and forming the company. But I think that the real relationship was from the beginning, or soon became, something different from what he had, somewhat loosely, thought it would be. As soon as he had put up the first instalment of his \$100,000—the \$27,000 mentioned in the receipt of the 14th August, 1917—he became (as was evidenced, later on, by the formal document) a co-owner with O'Connell in whatever rights O'Connell had under the option agreement. O'Connell then, with his knowledge and sanction, proceeded, in the name of Patricia Syndicate, to develop the property, with a view to getting out ore, from the proceeds of the sale of which the purchase-price of the property was to be paid, and, as incidental to the main object, proceeded to open an account with the bank in the same name, to deposit to the credit of that account all moneys furnished by Sir Charles Ross, to borrow money in the name of the syndicate, to pledge, or agree to pledge, as security for that money, ore in which the two were jointly interested, and to acquire goods in the name of the syndicate on credit.

By the agreement of the 2nd May, 1918, Mr. O'Connell, pursuant to the original parol agreement, formally assigned to Sir Charles Ross, not only a half interest in his rights under the option, but also a half interest in all rights which he had or might have "in the business connected with the said option" (which, as interpreted by the recitals, meant "the business carried on under the name of the Patricia Syndicate") and in

"all of the assets of every kind connected with . . . the said business." This "business," or the "Patricia Syndicate," was treated, in the formal agreement, as something other than a mere alias for "O'Connell;" it was treated as an entity of some sort to which a loan might be made, and which was to earn profits; and when, on the 1st August, 1918, Sir Charles Ross put up \$15,000, additional to the \$100,000, he acted upon the assumption that there was some entity called Patricia Syndicate which could give him a promissory note—an entity in which he and O'Connell had such interests as would entitle them to divide between them such profits as that entity might make in the operations which it was carrying on. There may have been in Sir Charles Ross's mind, as well as in the mind of the gentleman who drew the agreement, some confusion as to the precise position of the "syndicate"—it may be that, as Sir Charles Ross and Mr. O'Connell agreed together that each would turn over to the company all his interest in the mine, and that they would divide in certain proportions the shares which the company was to issue in payment, there was no way in which the "syndicate," as such, could ever have any profits for division, unless, perhaps, it could sell such ore as might be on hand after the vendors ("the optionors") had been paid the whole of the cash called for by the option—but, whether or not there was confusion as to the possibility of the "syndicate's" having profits for division, there is, both in the agreement and in Sir Charles Ross's action, a recognition of the "syndicate," that is of the "business" owned by him and Mr. O'Connell, as an entity of some sort. If this "syndicate" was an entity, and not merely another name for O'Connell, then, when O'Connell developed the mine, opened a bank account, borrowed money, gave security, and bought goods, in the name of the syndicate, he did all those things *for* and as agent of the syndicate, and, in that sense, as agent for each member of the syndicate; and, if he and Sir Charles Ross were the "syndicate," these acts of his were done on behalf of and bind Sir Charles Ross: see the judgment of Jessel, M.R., in *Pooley v. Driver* (1876), 5 Ch. D. 458. At p. 476 the Master of the Rolls says:—

"You cannot grasp the notion of agency properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the Courts of Equity before it was part of the whole law of the land as it is now. But when you get that idea clearly you will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does

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not act as agent, in the ordinary sense of the word, for the others so as to bind the others; he acts on behalf of the firm of which they are members; and as he binds the firm and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity."

See also the judgment of Lord Justice Cotton in *Ex p. Tenant* (1877), 6 Ch. D. 303, at p. 317, where, speaking of Lord Cranworth's judgment in *Cox v. Hickman* (1860), 8 H.L.C. 268, 306, and of the statement that if a business is carried on by one person on behalf of another there is a partnership, he says that Lord Cranworth's language shews that he "meant to speak of the action of one partner for the other when one partner is the agent of the partnership, and the agent, therefore, of his co-partner."

There was no agreement, in so many words, that Sir Charles Ross should be a member of the Patricia Syndicate—if there had been, the case, I think, would have been perfectly plain—but there was the acquisition by him of a half interest in the business known as the syndicate, and there was the recognition of the syndicate as "a separate entity from the existence of the" members of it, whoever they were, and the question, as it appears to me, is whether there existed, in fact, that separate entity—be it called "firm" or "syndicate" or "business"—and, if so, whether the two, Sir Charles Ross and Mr. O'Connell, were the members of it. The answer to that question of fact is to be found, as I have said, in the evidence, taken as a whole, and not in some expression, perhaps carelessly used, in a document or letter—for instance, the statement in the agreement of the 2nd April, 1918, that the purpose of the agreement is to make definite the terms and conditions under which the parties thereto have been carrying on the business—or in some single act, such as Sir Charles Ross's act in stipulating, when he put up his last \$15,000, that he should be repaid before any division was made of profits earned by the syndicate: any given expression may have been inaccurate: any given act may have been done under a misapprehension of the facts. I do not mean that no attention is to be paid to expressions in the letters or documents, or to any particular act; what I am endeavouring to do is to treat the evidence as to the language used, and as to the acts done,

as what it really is, viz., as part of the whole body of evidence upon which the finding is to be based. Again, the fact that, as between Sir Charles Ross and Mr. O'Connell, there was co-ownership of all such rights as were conferred upon the latter by the option agreement, is not, in itself, decisive: co-ownership may be consistent with the non-existence of any partnership: *French v. Styring* (1857), 2 C.B.N.S. 357; *Jones v. Gould* (1913), 209 N.Y. 419; but it is a fact which has to be considered with the others.

Taking the evidence as a whole, I think that it does shew that there was the entity of which Jessel, M.R., spoke—the firm. To state the matter shortly, without again going over the evidence which has been reviewed at, perhaps, unnecessary length, it may be said that, in exercising the rights conferred by the option agreement, Mr. O'Connell was exercising rights which, as between him and Sir Charles Ross, were the rights of both, and was exercising them for the benefit of both, and not merely for the purpose of rendering his own concession valuable, and incidentally benefiting the man who had put money into the venture; that in the course of his operations he was borrowing money and buying goods, not, at least nominally, on his own credit, but on the credit of Patricia Syndicate, and was pledging, or agreeing to pledge, ore which was no more his than Sir Charles Ross's; that all this he was doing with the knowledge and consent of Sir Charles Ross, so that what he was doing he was doing *for* the two; in other words, that there was “a joint business carried on on behalf of the two,” which is a partnership: *Badeley v. Consolidated Bank*, 38 Ch. D. 238, *per* Lord Justice Cotton, at p. 250. “No one has ever doubted that if the adventure is carried on for a person so that it is his business, then he is a partner:” *Adam v. Newbigging* (1888), 13 App. Cas. 308, 316; and I cannot draw from the whole of the evidence any conclusion other than the conclusion that the business known as the Patricia Syndicate was carried on for Sir Charles Ross and Mr. O'Connell so that it was their business. If I am right in drawing this conclusion—which, it may be observed, is consistent with, even if it is not a necessary result of, the letters, the action of Sir Charles Ross as regards the promissory note, and the declaration in the fourth clause of the agreement that the parties to the agreement had been carrying on the business known as the Patricia Syndicate—I do not know how to describe the relationship between the two otherwise than as the relationship of partnership. See also *Wheatcroft v. Hickman* (1860), 9 C.B.N.S. 47, and contrast with it *McKim v. Bixel* (1909), 19 O.L.R. 81, a case in which the persons whom it was

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sought to make liable had no control of any kind over the business, but had merely a right to share in the net profits, which did not constitute them partners.

I am not forgetting that, if the option was exercised and the land became the property of Sir Charles Ross and Mr. O'Connell, the mine was to be turned over to the company, and that the shares of stock issued in payment for it were to be divided in certain fixed proportions, and that, except in the assumption, made by the draughtsman of the agreement and by Sir Charles Ross, that the "syndicate" would, in some event, have profits for division, there is no evidence anywhere that, under any circumstances, Sir Charles Ross and Mr. O'Connell were to take an account of the expenses of the operations carried on and divide between them the sum by which the amount taken in exceeded those expenses. Nor am I overlooking the statement made by Sir Montague Smith, in delivering the judgment of the Judicial Committee of the Privy Council in *Mollwo March & Co. v. Court of Wards*, L.R. 4 P.C. at p. 436, that "to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common;" but I do not think that that statement necessarily means that there can be no partnership unless there is an agreement to share "net" profits; that it does not necessarily bear that meaning is evidenced by the fact that where, on p. 433, His Lordship refers to the rule which, before the decision in *Cox v. Hickman*, was said to be established as a rule of law, viz., that participation in the profits of a business made the participant liable as a partner, he uses the expression "net profits," which he does not use in the statement to which I have referred. It is to be noted that, in most of the cases in which the subject has been discussed, the matter to be considered has been, not the possibility of a partnership without participation in net profits, but the effect, as evidence of a partnership, of a finding that there was participation in net profits. See on this point in the judgment of Blackburn, J., in *Bullen v. Sharp* (1865), L.R. 1 C.P. 86, at p. 110, a quotation from Lord Cranworth's judgment in *Cox v. Hickman*: "It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for and on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When

that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is, to say that the same thing which entitles him to the one makes him liable to the other, viz., the fact that the trade has been carried on on his behalf, i.e., that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made."

It seems to me that in the agreement that the mine, if acquired, was to be turned over to the company for shares which were to be divided between Sir Charles Ross and Mr. O'Connell, there was a provision for the division of what was to be acquired as a result of the operations which were to be carried on, and that, while those shares would not have been "net profits," they might fairly accurately have been called "profits," in the sense in which the expression was used by Sir Montague Smith in the passage quoted, and, therefore, that there is nothing in his judgment which tells against the conclusion to which I am led by the evidence in this case, and by the other authorities to which reference has been made.

I have mentioned that one or two of the advances by the bank were made after the time when it became apparent that Sir Charles Ross was not going to give his personal guarantee to the bank, and that at least one was made after he had expressly declared that he would not "increase his investment;" but I do not think that this fact lessens his liability even in respect of those last notes; for, if he was a partner, as I think he was, the notice that he would not be bound by his co-partner's acts must be ineffective: see Lindley on Partnership, 8th ed., p. 255.

There will be judgment for the plaintiffs for the amount claimed, with costs.

x

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[IN BANKRUPTCY.]

Sept. 3.

RE BLUEBIRD FASHION SHOPS LIMITED.

Bankruptcy—Proposal for Extension of Time—Acceptance—Meeting of Creditors—“Majority of all the Creditors”—Bankruptcy Act, secs. 13 (3) (11 & 12 Geo. V. ch. 17, sec. 12), 42 (14)—Claims under \$25—Voting Power.

The debtors made a proposal for an extension of time under sec. 13 of the Bankruptcy Act; no receiving order or assignment had been made; and at a meeting of the creditors called to consider the proposal a resolution accepting it was adopted:—

Held, that, except in so far as sec. 13 has expressly provided otherwise, the provisions of sec. 42 apply to meetings called under sec. 13; and the words of sec. 13, sub-sec. 3 (as amended by 11 & 12 Geo. V. ch. 17, sec. 12), “a majority of *all* the creditors,” do not constitute an exception to the provisions of sub-sec. 14 of sec. 42 which regulate the voting powers of creditors.

While in calculating the two-thirds in value it is necessary to take into consideration all the proved claims, including those under \$25, the majority is to be calculated not by mere numbers but by voting power, and therefore to the exclusion in such calculation of the claims under \$25.

The majority in favour of the proposal in this case being, upon the above principle, sufficient, the proposal was approved by the Court.

MOTION by the authorised trustee in bankruptcy of the above named company for an order approving a proposed extension of time.

The motion was made in the first place to the Registrar, who had previously ruled, in *Re Hodgson* (not reported or noted) that in estimating the majority of creditors required under sec. 13 (3) of the Bankruptcy Act, as amended by 11 & 12 Geo. V. ch. 17, sec. 12, “all the creditors” must be construed to mean “all the creditors entitled to vote,” and that, as creditors whose claims were under \$25 were, by sec. 42, excluded from voting, their claims were not to be taken into account except for the purpose of calculating the required two-thirds of the proved debts.

As the point, however, was one which seemed to be likely to arise frequently, the Registrar thought it would be better to have the opinion of the learned Judge in Bankruptcy, and he therefore adjourned the motion for hearing by the Judge.

September 2. The motion was heard by ORDE, J., in Chambers.

B. Luxenberg, for the authorised trustee.

No one *contra*.

September 3. ORDE, J.:—This matter was referred to me by the Registrar for a ruling as to the meaning of sub-sec. 3 of sec. 13 of the Bankruptcy Act, as amended by the Act of last session, 11 & 12 Geo. V. ch. 17, sec. 12.

The debtors made a proposal for an extension of time under sec. 13. No receiving order or assignment has been made. The trustee duly called a meeting of the creditors to consider the proposal, and at the meeting a resolution accepting the proposal was adopted. The question which now arises is, whether or not the provisions of the concluding sentence of sub-sec. 3 of sec. 13 have been satisfied. The total amount of the claims of 33 unsecured creditors, as shewn in the debtors' statement of affairs, was \$9,420.45. Among them were several creditors for sums of less than \$25 each. The resolution accepting the proposal was approved by 15 creditors (including one for less than \$25) whose total claims amounted in the aggregate to \$5,274.18, and there were two creditors whose claims together amounted to \$1,157.35 who dissented. At the date of the meeting, only 19 of the 33 unsecured creditors had filed formal proof of their claims, the total amount so filed being \$7,566.65. One of these claims was for less than \$25.

Sub-section 3 of sec. 13 as originally passed provided that "if at such meeting a majority in number of creditors who hold two-thirds in amount of the proved debts resolve to accept the proposal . . . it shall be deemed to be duly accepted by the creditors." The amended sub-section reads, "If at the meeting . . . a majority of all the creditors and holding two-thirds in amount of all the proved debts, resolves," etc.

In the present case, those voting to accept the proposal hold \$5,274.19 out of \$7,566.55, the amount of the proved debts, so that the requirement of the Act as to the two-thirds in value is satisfied; but what is the meaning of the provision that there must be "a majority of *all* the creditors?" It is suggested that this may mean that the resolution must be accepted by a majority in number of all the creditors, including those whose claims are under \$25, and without regard to the votes which by sub-sec. 14 of sec. 42 are given to creditors according to the respective amounts of their claims. I think that a little consideration will shew the fallacy of this suggestion. The original sub-section speaks of a "majority in number," while in the amended sub-section the words are "a majority of all the creditors." If the dropping of the words "in number" is of any significance, it strengthens the argument that the majority under the amendment is not to be ascertained merely by counting

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those in favour of the motion without regard to their voting power under sec. 42. In other words, the words "a majority of all the creditors" mean "a majority of the votes of all those creditors entitled to vote." Except in so far as sec. 13 has expressly provided otherwise, I am of the opinion that the provisions of sec. 42 apply to meetings called under sec. 13, and I do not regard that portion of sub-sec. 3 of sec. 13 now under consideration as constituting any exception to the provisions of sub-sec. 14 of sec. 42 which regulate the voting powers of creditors. It must not be overlooked that sec. 13 applies as well to cases where a receiving order or an authorised assignment has been made, and it would be anomalous to have different methods of calculating the votes at meetings of creditors merely because in one case sec. 13 has been resorted to without any receiving order or authorised assignment. To exclude the provisions of sub-sec. 14 of sec. 42 would be to give to the smaller creditors a preponderance of voting power, which the Act did not intend. In fact it would enable, for example, three creditors with claims of \$5 each to prevent a proposal for an extension being accepted by two creditors with claims of a million each.

I am, therefore, of the opinion that, while in calculating the two-thirds in value it is necessary to take into consideration all the proved claims, including those under \$25, the majority is to be calculated not by mere numbers but by voting power, and therefore to the exclusion in such calculation of the claims under \$25.

Upon this principle, the majority in favour of the proposal in the present case is sufficient; and the proposal is therefore approved by the Court.

[IN BANKRUPTCY.]

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Nov. 14.

Bankruptcy—Petition for Receiving Order—Bankruptcy Act, sec. 3 (e) —Judgment Debt—Judgment Recovered in Action for Tort—Execution—Return of Nulla Bona—Cause of Action Arising in Part before Coming into Force of Bankruptcy Act—Continuing Cause of Action—Wrongs Committed after Act in Force—Available Act of Bankruptcy—Debt upon which Petition might be Founded—Ability of Debtor to Pay Claim—Opportunity to Pay before Issue of Receiving Order.

The Bankruptcy Act, 1919, came into force on the 1st July, 1920; and sec. 8 (2) provides that no act or omission by the debtor in respect of any debt which (b) is evidenced by any judgment or negotiable or renewable instrument the cause or consideration whereof existed before the coming into operation of the Act, shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition.

The petition for a receiving order was based upon a judgment debt owed by the debtor to the petitioning creditor, the judgment having been recovered in February, 1921, and the available act of bankruptcy alleged consisted in the return of *nulla bona* to a *fi. fa.* issued upon the judgment (sec. 3 (e)). The action in which the judgment was recovered was for criminal conversation and alienation by the debtor of the affections of the wife of the petitioning creditor. The alienation began before the 1st July, 1920, and continued until some period after that date, and some of the acts of adultery upon which the cause of action for criminal conversation was based took place after the 1st July, 1920:—

Held, by ORDE, J., that sec. 8 (2) applies to a judgment where the cause of action is a tort.

Held, also, that, some part of the cause of action having come into existence after the 1st July, 1920, it was of no consequence that some other part existed before that date, and a judgment founded upon such cause of action was sufficient either as an available act of bankruptcy or as constituting a debt upon which to found the presentation of a bankruptcy petition.

If the debtor is in a position to pay the petitioning creditor, no receiving order ought to be made against him without giving him some opportunity of paying or securing the debt.

A receiving order was pronounced, but it was directed that it should not issue for seven days, and should not then issue if, in the meantime, the petitioner's claim, including the costs of the petition should be satisfied.

The order was affirmed upon appeal.

MEREDITH, C.J.C.P., was of opinion that the "cause" sued on was not one which existed before the Act came into force: it was all one cause of action, and it arose after the Act came into force.

APPLICATION by Francis R. Maguire, upon petition under the Bankruptcy Act, for a receiving order against James D. Maguire.

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September 15. The application was heard by ORDE, J., in Chambers.

A. B. Cunningham, K.C., for the petitioning creditor.

H. S. White, K.C., for the debtor.

September 16. ORDE, J.:—This application for a receiving order presents some unusual features. The petitioning creditor, Francis R. Maguire, recovered judgment in the Supreme Court of Ontario, on the 18th February, 1921, against his brother James D. Maguire for \$15,000 and costs, the causes of action being criminal conversation and the alienation of the petitioning creditor's wife's affections by the defendant. An appeal from this judgment to the Appellate Division was dismissed on the 14th June, 1921, and from that judgment the defendant has appealed to the Supreme Court of Canada and has given the required security for costs. In order to obtain a stay of execution the defendant also obtained an order allowing him to give security for the judgment debt and costs, but he failed to furnish the requisite security. The judgment creditor thereupon issued a writ of execution to the Sheriff of the County of Frontenac, and the sheriff has returned the writ *nulla bona*.

There are certain securities held for the debtor in trust under the terms of the will of an aunt, and on the 27th June last the debtor purported to assign these securities to one Arthur Smith.

The petition for the receiving order is based upon the judgment debt owing by the debtor to the petitioning creditor, and the alleged available act of bankruptcy consists of the return of the writ *nulla bona*, under sec. 3 (e) of the Bankruptcy Act. The petitioning creditor, upon notice, asks that the petition be amended by adding, as an additional available act of bankruptcy, the assignment of the securities to Arthur Smith made by the debtor on the 27th June last, as being made with intent to defraud, defeat, and delay the creditors under sec. 3 (b), and I have granted leave to amend accordingly.

The petitioning creditor has endeavoured, by means of an attaching order and a motion for the appointment of a receiver, to realise by way of equitable execution upon the securities in question, but the attachment and receivership proceedings, owing to the opposition of the debtor, have not yet been finally disposed of.

Within the past few days, namely, on the 10th September, 1921, Arthur Smith re-assigned his interest in the securities in question to the debtor. No evidence has been adduced as to the object of the assignment of the 27th June last to Smith, or why the securities have been re-assigned to the debtor. The fact

that the assignment took place within a few days after the delivery of the judgment of the Appellate Division, and that the re-assignment has taken place within a few days before the presentation of the bankruptcy petition, gives rise to the suspicion that the assignment was in fact made for the purpose of defeating and delaying the petitioning creditor in the recovery of his judgment debt.

The debtor opposes this application upon several grounds. Most of these are of a technical nature, and were disposed of by me upon the hearing. The substantial ground upon which the petition is opposed is that the judgment which the petitioning creditor holds against the debtor does not, under the circumstances under which it was obtained, constitute a debt upon which the petitioner can obtain a receiving order. It is admitted by counsel for both parties that the alleged alienation of the wife's affections, which formed one of the causes of action upon which the judgment was based, began before the 1st July, 1920, on which date the Bankruptcy Act came into force, and that it continued until some period after the 1st July, 1920, and in fact up till the date of the trial of the action, and it is also admitted that some of the acts of adultery upon which the cause of action for criminal conversation was based took place after the 1st July, 1920. By its verdict the jury distributed the damages, one portion being given for the criminal conversation, and the other for the alienation of the wife's affections; but the judgment, as entered, is, I understand, for the sum of \$15,000, without any distinction as to the two causes of action. Sub-section 2 of sec. 8 of the Bankruptcy Act provides that:—

“No act or omission of a debtor in respect of any debt which (b) is or is evidenced by any judgment or negotiable or renewable instrument the cause or consideration whereof existed before the coming into operation of this Act, shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the presentation of a bankruptcy petition.”

Mr. White contends that, as a part of the cause of action upon which the judgment was based arose before the 1st July, 1920, the judgment debt cannot be treated as an available act of bankruptcy or as a debt upon which to found the petition. In the first place, it seems to be reasonably clear that this section applies to a judgment where the cause of action is a tort, and would undoubtedly apply in any case where the whole cause of action arose before the 1st July, 1920, although the judgment itself may not have been recovered until after that date. It is contended, however, on behalf of the petitioning creditor, that

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where there is a continuing cause of action up to the date of the trial, as there was here so far as the alienation of the wife's affections is concerned, or where any part of the cause of action was an act which happened after the 1st July, 1920, as was the fact with regard to the charges of adultery, the cause of action upon which the judgment is based ought to be deemed to have existed after that date. Mr. White's contention went this length, that, if any part, no matter how small or immaterial it might be, of the cause of action arose prior to the 1st July, 1920, that was sufficient to exclude the jurisdiction of the Court to make a bankruptcy order. The section in question does not follow any previous bankruptcy legislation, so far as I am aware, and the point is one of first impression. Mr. White contended that there was an analogy between the position here and that under the Division Courts Act where in order to give territorial jurisdiction the whole cause of action must have arisen within the jurisdiction. The analogy is rather strained; but, if there is any, then it rather tends against Mr. White's contention than in its favour. In the absence of any such provision as that contained in sub-sec. 2 of sec. 8, the question as to the date when the indebtedness first arose would not arise. The sub-section does not define what debts come within the Act but declares what debts are to be excluded from those which are to be deemed available acts of bankruptcy, or as sufficient to found the presentation of a bankruptcy petition. And so, to come within the scope of the sub-section, the whole cause of action must have arisen before the 1st July, 1920, and if any part of the cause of action can be shewn to have arisen after that date then there is no room for the operation of the sub-section. This is the view which I think must prevail. Where, as here, it is shewn that the judgment is based upon a continuing cause of action any part of which has arisen since the coming into operation of the Act, that is, subsequent to the 30th June, 1920, I do not think the Court ought to inquire for the purpose of determining to what extent, if any, some part of the cause of action arose prior to that date. Some part of the cause of action having come into existence after the Bankruptcy Act came into force, then it is of no consequence that some other part of the cause of action may have existed prior to that date, and a judgment founded upon such cause of action is, in my opinion, sufficient either as an available act of bankruptcy or as constituting a debt upon which to found the presentation of a bankruptcy petition.

For these reasons, I think the petitioning creditor is entitled to a receiving order.

So far as the other ground is concerned, it was contended by

Mr. Cunningham that the debtor, having once made a fraudulent assignment which constituted an act of bankruptcy, could not escape its consequences by obtaining a re-assignment to himself, because he might repeat the assignment the moment the bankruptcy petition was dismissed. In view of my judgment upon the other point, it seems hardly necessary to deal with the question whether or not the assignment of the securities by the debtor was, in fact, a fraudulent conveyance.

The present case presents this additional unusual feature. It is said that the debtor has ample means with which to pay the petitioning creditor's judgment debt, and there is no evidence that there are any other creditors. The petitioning creditor stated that upon payment he would have no further reason for proceeding with the petition. The Canadian Bankruptcy Act contains no provision corresponding to that in the English Act enabling the judgment creditor who desires to obtain payment of his own debt to give what is called a "bankruptcy notice," failure to comply with which, within the time fixed by the Act, entitles the Court to make a receiving order. The present situation corresponds to that which in England would be dealt with by a bankruptcy notice. If the debtor is in a position to pay the petitioning creditor, it seems to me that no receiving order ought to be made against him without giving some opportunity of paying or securing the debt. For that reason the receiving order will not issue or become effective until seven days after the delivery of this judgment, and not then if, in the meantime, the petitioning creditor's claim, including the costs of this petition, be satisfied.

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James D. Maguire appealed from the order of ORDE, J.

November 14. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

H. S. White, K.C., for the appellant.

A. B. Cunningham, K.C., for Francis R. Maguire, the respondent.

THE COURT, after hearing counsel, dismissed the appeal with costs.

MEREDITH, C.J.C.P., said that whether Mr. Justice Orde was altogether right or was wrong in some respects seemed to him (the Chief Justice) to make no difference, because the cause of action on which the judgment was recovered arose after the

App. Div. Act came into force; and it could make no difference that the
 1921. plaintiff might have had another like action before that. The
 "cause" sued on was not one which existed before the Act came
 into force: it was all one cause of action, and it arose after the
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[MULOCK, C. J. Ex.]

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 Trust—Evidence—Intention—Declaration of Trust by Wife by
 Affidavit Made on Application for Probate of Husband's Will—
 Knowledge of Wife—Registration of Conveyance—Registry Act—
 Statute of Frauds—Declaration Binding on Representatives of Wife
 —Trust Declared in Action by Surviving Executor of Husband.*

If a man purchases land and pays for it with his own money but causes it to be conveyed to a stranger, then, for want of consideration, there is a resulting trust in the purchaser's favour. But if he causes the conveyance to be made to his wife the relationship implies a consideration, and the law presumes that the conveyance was intended as an advancement—the relationship implies the intention of the husband to make an advancement to his wife. The existence of such intention is a question of fact, and if the evidence disproves such intention the wife is a trustee for her husband. The onus is on the party seeking to establish a trust to rebut the legal presumption of an advancement by shewing the existence of a contrary intention at the time of the conveyance. Evidence of subsequent intention will not discharge the onus, nor will evidence of the purchaser's actions subsequent to the conveyance. If the purchaser, at the time of the purchase and the conveyance to his wife, does not intend a resulting trust, he cannot by a subsequent change of intention deprive her of the beneficial ownership and make her a trustee for him. *Christy v. Courtenay* (1849), 13 Beav. 96, 98, *Groves v. Groves* (1829), 3 Y. & J. Ex. 163, *Sidmouth v. Sidmouth* (1840), 2 Beav. 447, and *Williams v. Williams* (1863), 32 Beav. 370, followed.

Land purchased by C. was conveyed by the vendor to C.'s wife, and the conveyance was registered. After the death of C., his widow, in making, as one of his executors, an affidavit to lead a grant of letters probate of his will, included in the inventory of lands belonging to C. the land that had been conveyed to her, and made an affidavit verifying the inventory:—

Held, that, by the Registry Act, she was deemed to have notice of the conveyance to her; and thus, when she made the affidavit, and knew that the legal estate was vested in her, she said, in substance, over her own signature, that, although she held the legal estate, her husband was at the time of his death the beneficial owner.

The affidavit did not rebut the presumption of an advancement at the time of the conveyance to her, and therefore did not give rise to a resulting trust; but, as a declaration of trust, meeting the requirements of the Statute of Frauds, it bound her as determining that she held the land in trust for her husband at the time of his death, and it was binding on her representatives.

In this action the plaintiff, as the surviving executor and trustee under the will of John Curry, deceased, sought a declaration that Frances Arabella Curry, deceased, held certain lands in trust for the said John Curry.

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The action was tried by MULOCK, C.J. Ex., without a jury, at Sandwich.

J. H. Rodd, K.C., and *A. C. Bell*, for the plaintiff.

A. B. Drake, for the defendant Mary Genevieve Curry.

E. C. Kenning, for the defendants W. G. Curry and Verene May McLeod.

September 16. MULOCK, C.J. Ex.:—The facts are as follows:—John Curry died on the 11th May, 1912, having by his will appointed his wife, Frances Arabella Curry, his son Charles Francis Curry, and the plaintiff, his executors and trustees, and probate issued to them on the 18th July, 1912. His widow died on the 30th October, 1912, intestate, and her son, the said Charles Francis Curry, was appointed administrator of her estate. He died, intestate, on the 24th March, 1920, leaving his widow, the defendant Mary Genevieve Curry, him surviving, and the defendant W. G. Curry was appointed administrator of his estate, and the defendant Verene May McLeod was appointed administratrix *de bonis non* of the estate of the said Frances Arabella Curry. By agreement dated the 13th April, 1895, Hiram Walker, for valuable consideration, agreed to sell to William McGregor and the said testator, John Curry, the lands mentioned in the agreement. By indenture of mortgage, bearing date the 6th May, 1895, the said William McGregor granted the lands mentioned in the said agreement to T. W. McKee to secure payment of \$15,000. By deed bearing date the 8th June, 1897, the said William McGregor, in consideration of one dollar and other valuable consideration, granted to the said Frances Arabella Curry a portion of the lands purchased as aforesaid by the said McGregor and John Curry from Hiram Walker, subject to the payment by her of one-half of the said mortgage debt of \$15,000. By agreement dated the 15th August, 1897, between Thomas W. McKee and John Curry and William McGregor, after reciting that William McGregor had sold and conveyed to John Curry certain lots described in the said mortgage, subject to the payment to the said McKee and John Curry of \$7,500, being one-half of the said \$15,000, the said John Curry covenanted with the said McKee to pay to him the said \$7,500 and interest. The lands in the agreement of the 17th August, 1897, mentioned as having been sold and conveyed to John

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Curry, embrace a part of the lands in question in this action, but there is no evidence of their conveyance to John Curry; they had been conveyed to his wife, the said Frances Arabella Curry, by the said McGregor by the said indenture of the 8th June, 1897.

In addition to the lands conveyed by William McGregor to the said Frances Arabella Curry, John Curry caused to be conveyed to her other lands, and up to the time of his death she, at his instance, had executed conveyances to various persons of portions of various lands, and at the trial it was alleged by the plaintiff's counsel that John Curry treated the lands vested in his wife as his own, contracting for sales and receiving purchase-moneys, his wife implementing his contracts by executing necessary conveyances, and that the books of the said John Curry shew that he retained for his own use the purchase-moneys in respect of lands thus sold. The plaintiff swore that on the 13th or 14th May, 1912, being a day or two after John Curry's death, Frances Arabella Curry informed him that she owned only two lots of land. On application for probate of John Curry's will, the plaintiff McLeod, the said Charles Francis Curry, and Frances Arabella Curry filed their joint affidavit as to the assets of John Curry's estate, para. 4 of which is as follows:—

"That the value of the personal estate and effects is under \$201,700, and of the real estate is under \$227,000, and that full particulars and a true appraisalment of all the said property are set forth in exhibits A and B hereto, which contain a full and true and correct inventory and valuation of the real and personal estate and effects of the said deceased at the time of his death, as far as we have been able to ascertain the same."

The first part of the exhibit annexed to that affidavit, shewing the realty owned by the deceased John Curry, is entitled "Lands owned by the late John Curry in the Province of Ontario;" then follows the description of a large number of properties. The exhibit then proceeds, "Ontario lands owned by the late A. Cameron and deceased in which each had an undivided one-half interest," and the description of about 250 parcels follows. In para. 10 of the statement of claim the plaintiff enumerates, or describes, the lands which he alleges John Curry caused to be vested in Frances Arabella Curry in trust for himself, and he asks for a declaration that they belong to John Curry's estate, and that he be given appropriate relief.

The defendants deny the existence of a trust, allege that the said Frances Arabella Curry was beneficial owner of the said lands, and of other lands vested in her, and that during his

lifetime John Curry sold portions of her lands and is accountable to her estate in respect of the purchase-money, and that since his death other portions of such lands have been sold and the purchase-moneys paid to the plaintiff as the executor of John Curry, deceased, and contend that all such moneys should be paid over to the administratrix of the estate of Frances Arabella Curry.

The plaintiff contends that, the lands in question having been purchased and paid for by John Curry, and at his instance conveyed to his wife Frances Arabella Curry, a resulting trust in his favour arose. If a man purchases and pays for lands with his own money and causes them to be conveyed to a stranger, then, for want of consideration, there is a resulting trust in the purchaser's favour. But if he causes the conveyance to be made to his wife the relationship implies a consideration, and in such case the law presumes that the conveyance was intended as an advancement, that is, the relationship implies the intention of the husband to make an advancement to his wife. The existence of such intention, however, is a question of fact, and if the evidence disproves such intention then the wife is a trustee for her husband. Here the onus is on the plaintiff to rebut the legal presumption of an advancement, by shewing a contrary intention on the part of John Curry at the time of the conveyance. Evidence of subsequent intention will not discharge the onus, nor will evidence of the purchaser's actions subsequent to the conveyance to the wife: *Christy v. Courtenay* (1849), 13 Beav. 96, 98. If a purchaser, at the time of the purchase and conveyance to, say, his wife, does not intend a resulting trust, he cannot by subsequent change of intention deprive her of the beneficial ownership and make her trustee for him: *Groves v. Groves* (1829), 3 Y. & J. Ex. 163; *Sidmouth v. Sidmouth* (1840), 2 Beav. 447; *Williams v. Williams* (1863), 32 Beav. 370.

The pleadings suggest conveyances at the instance of John Curry to his wife of various lands, but there is no evidence of any such conveyances other than that of the 8th June, 1897, from William McGregor, and I assume that this conveyance was made by the direction of her husband, John Curry. Apart from the wife's affidavit on the application for probate of her husband's will, there is, I think, no evidence sufficient to rebut the presumption of law that this conveyance to her was by way of advancement. Assuming it to be true that John Curry from time to time purchased and paid for various lands and caused them to be conveyed to his wife, and thereafter purported to regard them as his own by contracting in his own name for their sale and by collecting and retaining the purchase-moneys, still such subsequent conduct does not negative an intention of

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advancement at the time of such conveyances to her. The plaintiff in his evidence speaks of an interview with her a day or two after her husband's death, when, he says, she told him that she owned only two lots of land. At that time, I presume, her husband was lying dead in her house, and it was not a suitable time for the plaintiff to discuss business with her or to obtain from her admissions prejudicial to her interest. She may on that occasion have used language which the plaintiff construed into admissions such as he deposed to, but he may have attached an entirely erroneous meaning to her language. He did not pretend to give her precise words, nor the whole of the conversation, and she is not here to speak for herself. Under such circumstances, it would, I think, be quite unsafe to accept any one's uncorroborated recollection of an alleged verbal admission made 9 years age. Human memory is treacherous. Further it is to be observed that the plaintiff, as the husband of one of John Curry's daughters, has an interest against those claiming through John Curry's widow. Thus the case is narrowed down to the question, to what extent, if at all, the widow's affidavit establishes a trust. If at the time of the making of the affidavit it were shewn that she did not know that the said lands were vested in her, she might not be bound by the admission of a trust contained in the affidavit; but, if she knew it, then the affidavit was a good and sufficient declaration of trust by her that she held them in trust for him. The deed from William McGregor to her was registered on the 18th September, 1897, and, therefore, in declaring a trust in respect of the lands described in that deed, she is deemed by the Registry Act to have notice of the deed. Thus, when she made the affidavit, and knew that the legal estate was then vested in her, she said, in substance, over her signature, that, although she held the legal estate, still John Curry at the time of his death was beneficial owner, and that his estate should pay the succession duties payable in respect of such lands. The affidavit does not rebut the implied presumption of an advancement at the time of the conveyance from McGregor to her, and, therefore, does not give rise to a resulting trust; but as a declaration of trust, meeting as it does the requirements of the Statute of Frauds, it so binds her as determining that she held the land in trust for her husband at the time of his death, and it is binding on her representatives. Therefore I think that at the time of his death John Curry must be regarded as the beneficial owner of the lands conveyed by William McGregor to Frances Arabella Curry, and that the plaintiff is entitled to have the unsold portions of them conveyed to him as surviving trustee of John Curry's estate. If the list of lands set forth in the affidavit

includes the lands other than those described in the deed from McGregor, and if it were shewn that when making the affidavit Frances Arabella Curry did not know that such other lands were vested in her, and that they were hers beneficially, then her estate might be entitled to be relieved from the effect of an affidavit made in good faith, but in ignorance of the facts.. But such was not shewn, and therefore, I think, she is bound by the affidavit, and that it must be held that John Curry at the time of his death was the beneficial owner of all the lands described in the exhibit annexed to the affidavit.

I cannot determine from the evidence whether all the lands claimed by the plaintiff and described in the statement of claim are included in the said exhibit attached to the affidavit, but I am of the opinion that the plaintiff has failed to establish any right to lands not set forth in such exhibit. In their statement of defence the defendants William G. Curry, administrator of the estate of Charles Francis Curry, and Verene May McLeod, administratrix *de bonis non* of the estate of Frances Arabella Curry, allege that John Curry during the lifetime of the said Frances Arabella Curry sold certain of her lands and retained the purchase-money, and that since the death of Frances Arabella Curry certain other of her lands were sold and the purchase-money paid to the executors of John Curry as if the same formed part of his estate. If John Curry without the consent of his wife retained purchase-moneys paid to him of any of his wife's lands he is accountable in respect thereof. Payment of moneys belonging to the estate of Frances Arabella Curry to the estate of John Curry would be a misapplication, and the defendants, if they so desire, may amend their statement of defence by counterclaiming in respect of such moneys and have a reference to ascertain the extent, if any, of such misapplication, and also a reference as to what moneys, if any, of the said Frances Arabella Curry the said John Curry had in his hands at the time of his death, and also to payment of any moneys so found.

Judgment will be entered declaring that John Curry at the time of his death was the beneficial owner of the lands mentioned in the said exhibit, and directing the administratrix of the estate of Frances Arabella Curry to convey any unsold portions thereof to the plaintiff as the surviving executor and trustee of John Curry, deceased; and, on the defendants William G. Curry and Verene May McLeod amending their statement of defence, the judgment, if they desire it, will direct a reference to ascertain what moneys the proceeds of the sale of lands of Frances Arabella Curry have come to the hands of Charles Francis Curry and the plaintiff, or either of them, as executors and trustees of

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John Curry's estate, and also what moneys, if any, of the said Frances Arabella Curry the said John Curry had in his hands at the time of his decease.

Further directions and costs of such reference to be reserved until after the report of the Master.

This is a proper case for payment to all parties of costs, except those reserved, out of the estate.

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Municipal Corporations—By-law Passed by Council at Special Meeting—Regularity of Notice of Meeting—By-law Authorising Execution of Lease of Lands for Purposes of Corporation—Validity—Execution of Lease by Corporation—Execution by Son of Lessor under Power of Attorney—Expectant Interest of Son in Land—Son a Member of Council but Taking no Part in Deliberation or Decision—Absence of Fraud—Undertaking of Son on Behalf of Lessor to Perform Work upon Land—No Breach Shewn—Lease Effective when Executed—Remedy for Breach—Mental Incapacity of Lessor at Time of Execution of Lease—Existence of Capacity when Power of Attorney Executed—Effect of Insanity as Revocation of Power—Voidable Contract—Executors of Lessor Seeking to Enforce—Lease Binding on Corporation—Evidence as to Capacity.

A meeting of the council of the defendant town corporation was called by the clerk, by direction of the mayor, for the 30th December, 1915, for the purpose of passing a by-law authorising the leasing of premises for the operations of the Hydro-Electric Commission. One of the members of the council (F.) told the clerk in a telephone conversation that he preferred the 31st December, and the clerk changed the date of the meeting to the 31st, the mayor acquiescing and all the other members being advised of the change. The meeting was held on the 31st December, and all the members except F., who fully understood that the meeting was to be held on the 31st, were present:—

Held, that the meeting was legally convened.

At the meeting so held, a committee of council reported in favour of leasing a building owned by K., the report was adopted, a by-law was passed authorising the corporation to enter into the lease, and a lease was executed by K.'s son on his behalf, under a power of attorney, and by the corporation by the affixing of the corporate seal and the signatures of the mayor and clerk:—

Held, that the necessary by-law was duly enacted and the lease properly executed so as to bind the defendant corporation.

K.'s son was duly empowered to let K.'s real estate and had authority to execute the lease on behalf of K.

K.'s son was a member of the council; he took no part in the deliberations or decision of the committee or council in the matter of the lease; but it was said that he had an inchoate interest in the lands leased, and was disqualified from contracting with the corporation:—

Held, that, as K. had, at the time of the lease, no actual interest in the lands, which were owned by his father, although he might have expected to take an interest under his father's will, the contract was not affected by the circumstance that he was a member of the council.

The by-law on its face was valid and sufficient, the onus was on the defendant corporation to shew its invalidity or insufficiency; and that had not been done.

There was no ground for imputing to K.'s son any fraud, misconduct, or impropriety in respect of the lease.

It was said that the lease was procured by K.'s son upon his undertaking to perform certain work upon the premises as a condition precedent to the occupation thereof, and that the work was not done, whereby the lease never became effective:—

Held, that there had been no breach of the undertaking; and at any rate the lease took effect when executed by both parties, and if there had been a breach the only remedy would have been in damages.

K. was in his right mind when he executed the power of attorney to his son; but it was alleged that at the time of the execution of the lease he was of unsound mind and incapable of making the lease. In this action, the plaintiffs, the executors of K., were not seeking to set aside the lease; they were affirming it and asking the defendant corporation to perform its covenant to pay rent:—

Held, that the contract of a lunatic, voidable at his option, is binding upon the other party to the contract; and the lease here was, even if K. was of unsound mind when it was executed, binding on the defendant corporation.

Review of the authorities.

But the evidence was not sufficient to satisfy the Court that K. was incapable of making the lease.

ACTION by the executors of John Kerr, deceased, to recover the sum of \$2,254.83 for rent under a lease of premises in the town of Petrolia made by the said John Kerr to the defendant corporation.

The action was tried by MULOCK, C.J. Ex., without a jury, at Sarnia.

D. L. McCarthy, K.C., for the plaintiffs.

A. Weir, K.C., and *G. G. Moncrieff*, for the defendant corporation.

September 29. MULOCK, C.J. Ex.:—The facts are as follows. The Town of Petrolia was establishing a hydro-electric commission to carry on the business of supplying the inhabitants with electrical power, and, until the election of a local commission to take charge of the business, the Provincial Hydro-Electric Commission, on behalf of the town corporation, was acquiring the necessary plant. A valuable portion thereof had been delivered at Petrolia, and the Provincial Hydro-Electric Commission was anxious that the town should promptly acquire premises where it might be stored and the business carried on, and made its

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views known to the corporation. The municipal council had appointed a committee of its members, composed of the members of the hall and market committee and of the fire, light and water committee, to negotiate for securing premises for the commission, and Mr. Pollard, one of its members, was chosen chairman of this committee. Mr. Kenneth Campbell Kerr, one of the plaintiffs, was a member of the committee, but as such took no part in the committee's deliberations or duties. Informal efforts were made to secure offers of premises, and two offers were received, one from the Masonic Temple Company at a rental of \$375 a year, and another from John Kerr, through his attorney, Kenneth Campbell Kerr, at a rental of \$420 a year. The latter offer did not originate with Kenneth Campbell Kerr, but was the result of Mr. Pollard's asking him for an offer to lease John Kerr's premises. On the 15th December, 1915, the committee met and considered the two offers and passed a resolution to report to the council that "Your committee believe it to be in the best interests of the town to secure the building in the Tecumseh block owned by Mr. Kerr for the use of the Hydro-Electric Commission," and on the following day the Hydro-Electric Commission took and thereafter remained in possession of the premises until the local commission was elected on the 3rd July, 1916, when the latter entered into and remained in actual occupation of the premises until the 16th March, 1919. On the 29th December, 1915, the mayor directed the clerk to call a special meeting of the council for the 30th December for the purpose of passing a by-law authorising the leasing of premises, and, Dr. Fairbanks, one of the members of the council, being in London, the clerk by telephone notified him of the meeting, and during this telephone conversation Dr. Fairbanks informed the clerk to the effect that he would prefer it if the meeting was held on the 31st December, and I think it may fairly be inferred from the evidence and from what occurred that the clerk informed him to the effect that he would have the date of the meeting changed and that he might consider the meeting called for the 31st. The meeting took place not on the 30th but on the 31st, and all the members, except Dr. Fairbanks, were in attendance. Dr. Fairbanks was expected by the members until the conclusion of the meeting.

The clerk in his evidence was unable to say by what authority he changed the date of the meeting, but it is quite obvious from all that occurred that he told Dr. Fairbanks he might consider the meeting convened for the 31st, and so notified the mayor; that the latter acquiesced; that the other members were duly

notified of the change; and that Dr. Fairbanks fully understood that the meeting was to be held on the 31st.

The following is an extract from the minutes of the meeting of the 31st December: "The meeting was called at the request of the mayor for the purpose of considering a by-law to authorise the execution of a lease of premises for Hydro-Electric purposes." This minute shews that the clerk had the authority of the mayor to call the meeting and that the mayor ratified the notice which I think was given to Dr. Fairbanks by the clerk during the conversation over the telephone above referred to. Further, I think that in the absence of evidence the presumption is that the meeting was properly convened and that the onus was upon the defendant corporation to establish its invalidity, and this it has not done. I find that the meeting was legally convened, which finding includes the giving of legal notice to Dr. Fairbanks.

At this meeting the council adopted the resolution of the committee recommending the corporation to acquire a lease of the Kerr premises, Kenneth Campbell Kerr taking no part in the council's deliberations and requesting to be considered as not present. The council at this meeting passed a by-law (No. 1044) authorising the corporation to enter into the lease; and, upon the by-law being duly completed by the affixing thereto of the corporate seal and by the signing thereof by the mayor and clerk, the lease in question was executed by John Kerr, by his attorney Kenneth Campbell Kerr, and by the corporation, by the signatures to the lease of the mayor and clerk and the affixing thereto of the corporate seal of the corporation. This lease, though bearing date the 16th December, was not in fact executed by either party until after the completion of the by-law on the 31st December, the reason for its bearing an earlier date being no doubt that, the commission having on the 16th December entered into possession, it was proper that the rent should be computed from that day. The town solicitors in their letter of the 30th December to the town clerk enclosed the proposed lease and by-law, and it is clear from the tenor of that letter that the lease had not then been executed. The receipt of this letter is noted on the minutes of the 31st December.

The foregoing are the material circumstances in respect of the corporation having entered into the lease.

Dealing now with the defences, the first is that the lease was not authorised by by-law and that it was not in fact executed by the defendant corporation. I find that the necessary by-law was duly enacted and that the lease was properly executed so as

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to bind the defendant corporation, and therefore this defence fails.

For the moment I pass over the second defence.

Another defence is that Kenneth Campbell Kerr had no authority to execute the lease in the name and on behalf of John Kerr. By general power of attorney, bearing date the 13th October, 1913, John Kerr duly empowered Kenneth Campbell Kerr to let his real estate, and he was thereby fully empowered in the name of the said John Kerr to enter into the said lease. Therefore this defence fails.

Another defence is that Kenneth Campbell Kerr had an inchoate interest in the lands in question and was also a member of the council at the time of the making of the lease, and therefore was disqualified from contracting with the corporation. Until the death of John Kerr the premises were his and his alone. He may have devised an interest therein to Kenneth Campbell Kerr, and the latter may reasonably have expected to acquire an interest therein on the death of his father, but until then he had no interest. The contract was between John Kerr and the corporation and was not affected by the circumstance that Kenneth Campbell Kerr was a member of the council. Therefore this defence fails.

Another defence is that by-law No. 1044 did not authorise the corporation to execute the lease. This by-law was duly passed at a properly convened meeting of the council, and was duly completed as above stated, and its terms fully authorised the corporation to enter into the lease in question. Further, the by-law on its face is valid and sufficient, and the onus was on the defendant corporation to shew its invalidity or insufficiency, and this has not been done; and this defence fails.

Another defence is that the meeting of the 31st December was not legally convened. I have already stated all the material circumstances respecting the calling of this meeting and am of the opinion that it was legally convened. The passing of the by-law was one of the acts which the council at this meeting was entitled to perform; thus this defence fails.

Another defence is that the "alleged lease was a fraudulent attempt on the part of the said Kenneth Campbell Kerr to forestall the Hydro-Electric Commission, and he anticipated the results of the coming election, which he had reason to expect would result in his losing control of the council." I find it difficult to discover in the above quoted language any statement which, if proved to be true, would constitute a defence; but, if it means to charge Kenneth Campbell Kerr with having been guilty of any fraud, misconduct, or impropriety in connection

with the bringing about of the said lease or its execution by the corporation, I find that the question of the corporation leasing the premises of John Kerr did not originate with Kenneth Campbell Kerr but with Mr. Pollard, the then chairman of the committee of council which was charged with the task of securing premises then urgently needed by the commission; that, in compliance with Mr. Pollard's request, Kenneth Campbell Kerr, on behalf of his father, submitted an offer to the committee, but, though a member of the said committee, took no part whatever in procuring the acceptance of such offer either by voting thereon or urging its acceptance; that when the report of the committee was under consideration by the council he also abstained from voting or seeking to influence the council in favour of the offer. Throughout the whole negotiations from their commencement until their termination in the completion of the lease, he took no part either as a member of the committee or of the council in promoting the lease, and his conduct throughout appears to me to have been scrupulously correct, and the charge against him of fraudulent conduct or intent is baseless; and this defence fails.

Another defence is that the "lease was procured by the said Kenneth Campbell Kerr upon his undertaking to perform certain work upon the premises . . . as a condition precedent to the occupation thereof, and the said work was not done . . . whereby the said alleged lease never came into effect." The Provincial Hydro-Electric Commission was in actual occupation of the demised premises when the lease was executed, and the local commission when elected entered into occupation. Thus it is clear that the performance of the work could not have been intended to precede occupation. The facts are that after the execution of the lease John Kerr, by his attorney Kenneth Campbell Kerr, gave to the council the written undertaking bearing date the 31st December to make certain changes to the premises within one month; that in order to carry out such undertaking Kenneth Campbell Kerr inquired of the manager of the commission when the work might be done, whereupon the manager asked that it be not done then, stating that the place was filled with heavy equipment, and that he did not wish the work to be then proceeded with because of the inconvenience that would thereby be caused to the commission. In compliance with the commission's wishes, performance of the work was deferred to suit its convenience, and it was for the commission to notify the lessor when he might proceed with the work, for without the tenant's consent the landlord would have no right to enter and make the changes. I therefore find that John Kerr was not guilty of any breach of the said undertaking. I am further of

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opinion that the lease took effect when executed by both parties on the 31st December, 1915, and would not have been affected by any breach of the said undertaking, the only remedy in case of such breach being an action for damages. Thus the 12th defence fails.

The remaining defence is set forth in the third paragraph of the statement of defence in the following words: "The alleged lessor, John Kerr, at the time of making the alleged lease, was, by reason of disease and infirmity, mentally incapable of undertaking any business, was without any hope or chance of recovery, and was ill until speedy death, was wholly bereft of reason, and did not make or authorise the making of said lease."

From the evidence it appears that John Kerr had been engaged in real estate and other business for many years with headquarters in the town of Petrolia, and, being about to go away on a trip, executed on the 11th October, 1913, in favour of his son, Kenneth Campbell Kerr, the power of attorney under which the latter executed the lease in question. He was then perfectly sane. In the early part of 1914 he returned to Petrolia, and up to this time there is no evidence to shew any impairment of his mental faculties. In April, 1914, he went to Toronto to visit a sister, and there was taken ill and died on the 18th April, 1916, of arterial sclerosis, being then 74 years of age.

The defendant corporation also contended that at the time of the execution of the lease John Kerr was of unsound mind and incapable of managing his affairs, whereby the power of attorney was revoked or the right to act upon it was suspended, and that in either case the execution of the lease by Kenneth Campbell Kerr was unauthorised and the lease itself void.

As already stated, John Kerr was in his right mind when he executed the power of attorney. If, thereafter, and before the lease was executed, he became insane, then the questions are: what effect, if any, had such subsequent insanity upon Kenneth Campbell Kerr's previous authority to execute the lease, and upon the lease itself?

Some text-writers state that insanity of the principal *ipso facto* revokes the agency, but the cases do not support such an unqualified proposition: for example, in the leading case of *Drew v. Nunn* (1879), 4 Q.B.D. 661, it was held that a lunatic was liable on contracts made by his agent with third persons who were ignorant of the fact of the principal's lunacy, but to whom the lunatic when sane had represented that the agent had authority to contract for him; thus in such a case the principal's insanity does not revoke the agency. *Daily Telegraph Newspaper Co. v. McLaughlin*, [1904] A.C. 776, was cited in support

of the general proposition above mentioned, but that case is not in point. There the constituent of the power was insane when he executed it, and the Court held that, having no knowledge of what he was doing, his signing was merely a mechanical act and null and void. Thus it created no agency.

In the present case there was a valid delegation of authority. In the 15th edition of Anson on Contract, p. 433, reference is made to *Drew v. Nunn*, *supra*, in these words: "It seems no longer open to doubt since the case of *Yonge v. Toynbee*, [1910] 1 K.B. 215, that insanity annuls an authority properly created while the principal was sane." In that case solicitors were instructed by a client to conduct his defence in an anticipated action, but before action begun the client became and was certified as of unsound mind. The solicitors, in ignorance of the client's insanity, entered a defence, to which the plaintiff replied. Subsequently the plaintiff's solicitors, having learned of the defendant's insanity, moved in Chambers for an order setting aside the defence and all subsequent proceedings and ordering the solicitors who had purported to represent the defendant to pay the costs, and the learned Master set aside the proceedings but refused to order the solicitors to pay the plaintiff's costs. The only appeal from this order was in respect to the Master's refusal to award costs against the solicitors. The Court of Appeal held the solicitors liable for costs, on the ground that, in defending, they had impliedly warranted that they possessed the necessary authority, which, in fact, they had not, and had thereby to their prejudice misled the plaintiffs. But, in thus holding the agents liable for breach of warranty, the Court did not decide that what they had done was void. The Court was not called upon to consider and expressed no opinion in regard to that portion of the Master's order which set aside the proceedings. That portion of his order is, I think, contrary to the law as laid down in *Drew v. Nunn*, *supra*, and cannot be accepted as supporting the proposition that mere insanity for all purposes annuls an agent's authority created when the principal was sane; and I am of opinion that insanity alone (if such existed) of John Kerr at the time of the execution of the lease did not unqualifiedly revoke Kenneth Campbell Kerr's authority.

In *Imperial Loan Co. v. Stone*, [1892] 1 Q.B. 599, the defendant pleaded that he was insane when the contract sued on was made, and Lord Esher, M.R., in his judgment, says: "I shall not try to go through the cases bearing on the subject, but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards

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alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about. It can hardly be doubted that for a long series of years, if insanity was set up in answer to an action for breach of contract, it must have been pleaded, and the plea was not good unless it went on to allege knowledge on the part of the plaintiff. The fact of such a plea being required, and having to go to that extent, shews that the law as I have stated it was generally accepted."

In Pollock on Contract, 9th ed., p. 98, the law is thus stated:—

"The general rule as to the contract of a lunatic (at all events if not so found by inquisition) or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is that such a contract is voidable at his option, but only if his state is known to the other party: *Moulton v. Camroux* (1848), 2 Ex. 487.

Here the plaintiffs representing John Kerr are not seeking to set aside the lease, but are affirming it and asking the defendant corporation to perform its covenant to pay rent, and I am unable to discover any ground for their being relieved of their obligation.

In Chitty on Contracts, 17th ed., p. 162, reference is made in these words to contracts by persons under disability: "Parties who contract with those whom the law shields from responsibility cannot, in general, rely on the incapacity of the latter, as a defence. This, at least, is the rule in case of contracts with infants." In *Forrester's Case* (1661), 1 Sid. 41, 42, it was held *per* Twisden, J., that the lessee could not avoid the lease because of the lessor's infancy. In *Clayton v. Ashdown* (1715), 9 Vin. (Abr.) 393, pl. 4, an infant agreed to lease a farm to the defendant, who, when the infant came of age, refused to continue as lessee, and it was decreed that the defendant should take the lease.

Holt v. Ward (1733), 2 Strange 937, was an action by the plaintiff, an infant, for breach of promise of marriage, and it was held that, marriage being a contract advantageous to the infant, she was entitled to maintain the action. In the words of the Court, "Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give

him an opportunity to consider it when he comes of age: and it is good or voidable at his election . . . But though the infant has this privilege, yet the other party with whom he contracts has not: he is bound in all events."

Baxter v. Matthews (1872), L.R. 8 Ex. 134, was an action for breach of contract, and the defendant pleaded that when he entered into the contract he was so drunk as to be incapable of knowing what he was doing, and it was held that the defendant when he recovered his senses could have ratified the contract whereby the plaintiff would have been bound, and that if the defendant could take that position the right must be reciprocal.

Warwick v. Bruce (1813), 2 M. & S. 205, was an action by an infant for breach of contract whereby the defendant agreed to sell and the plaintiff to buy a quantity of potatoes, and it was held that, the contract being for the benefit of the infant, the action was maintainable.

These authorities, I think, warrant the conclusion that the contract of a lunatic, voidable at his option, is binding upon the other party to the contract, and therefore I am of opinion that as a matter of law the lease is binding on the defendant corporation.

Further, I am not satisfied that John Kerr was incapable of making the lease. He was suffering from arterial sclerosis, but the extent to which his mind was affected was a matter of degree only, and it is not correct to say that he was wholly bereft of reason.

Whilst unaided he might not have been capable of entering into contracts of a complicated or intricate nature, he had sufficient intelligence to understand the terms of the lease in question, and if at the time of its execution they had been explained to him, I think he was quite capable of forming a correct judgment in regard to them and of intelligently approving or disapproving of the lease.

For these reasons, I think the plaintiffs entitled to judgment for the arrears of rent, with interest and costs of the action.

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C.J.Ex.

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[MIDDLETON, J.]

Oct. 1.

RE OLIPHANT.

Devolution of Estates Act—Lands of Deceased Intestate—Interest of Widow at his Death—Failure to Elect under sec. 9 of R.S.O. 1914, ch. 119—Claim of Personal Representative—Alternative Claim to \$1,000 under sec. 12—Effect of sub-sec. 4.

The widow and administratrix of the estate of a man who died intestate, leaving real as well as personal estate, made no election under sec. 9 of the Devolution of Estates Act, R.S.O. 1914, ch. 119, but retained possession of the real estate, and was in receipt of the rents and profits during her lifetime. After her death the land was sold by the administrator *de bonis non* of the intestate:—

Held, that the widow's representative was not entitled to make an election after her dower-right had terminated by her death.

Held, also, having regard to the provisions of sub-sec. 4 of sec. 12 of the Act, that the absence of an election by the widow also debarred her representative from taking the \$1,000 mentioned in sec. 12 (there being no issue) in priority to the next of kin.

MOTION by the administrator of the estate of Maria Oliphant, deceased, for an order determining a question arising in the administration of her estate.

September 19. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

W. S. MacBrayne, K.C., for the applicant.

W. M. McClemon, for persons claiming title under Isaac Oliphant, deceased.

October 1. MIDDLETON, J.:—The late Isaac Oliphant died intestate on the 20th January, 1916, leaving him surviving his widow, Maria Oliphant. There were no children.

Maria Oliphant obtained letters of administration to the estate of her deceased husband, and upon her death on the 17th April, 1920, letters of administration *de bonis non* were issued to Robert Oliphant, her brother, and he also obtained letters of administration to her estate.

Isaac Oliphant left some realty, and between \$500 and \$600 worth of personalty. The debts of his estate amounted to a sum about equalling the personalty, and these were paid by the widow. The real estate was not sold until after the death of Maria Oliphant, when Robert Oliphant, under the letters of administration *de bonis non*, sold it, realising \$2,700.

Maria Oliphant did not make any election under the provisions of the Devolution of Estates Act, R.S.O. 1914, ch. 119, sec.

9, but retained possession of the real estate, and was in receipt of the rents and profits during her lifetime.

The question now is, whether those claiming under Maria Oliphant have any, and if so what, right to any portion of the proceeds of the land sold.

Notwithstanding Mr. MacBrayne's very careful and forcible argument, I am unable to agree with him. The situation appears to me to be made plain by the terms of the statute.

Under the Act referred to, the widow has her right of dower unless she expressly elects to take her share in the undisposed of realty of the testator. This election is required to be by a deed or instrument in writing. The right given to the widow is, as I understand it, personal, and it would not pass to her representatives. She may elect to give up her dower and to take the share. This is based upon the existence of her dower-right, and I do not think that it is possible that the Legislature intended that her representatives should have a right to elect after her dower-right had terminated by her death.

In the alternative, Mr. MacBrayne argued that, under the provisions of sec. 12 of the statute, by reason of there being no issue, the widow would be entitled to the \$1,000 mentioned in that section in priority to the next of kin, but the difficulty is that, by sub-sec. 4, the estate consisting in part of real property, the section shall apply "only if the widow elects under section 9 to take an interest in her husband's undisposed of real property in lieu of dower." In the absence of this election the section has no application and confers no right upon the widow.

In the statute as originally framed this provision is not found, and in Mr. Armour's book on Devolution, "Essays on the Devolution of Land upon the Personal Representative and Statutory Powers relating thereto" (1903), p. 226, he expresses the opinion, with which I may say I am in entire accord, that under the Act as it then stood the right was conferred upon the widow whether she elected or did not elect; but, by amendment, the clause which I have quoted is introduced, and it appears to me to determine the matter adversely to the widow.

Under the circumstances, I think it would be fair to allow the costs of both parties out of the husband's estate.

[An appeal to a Divisional Court of the Appellate Division was dismissed on the 18th November, 1921. See 21 O.W.N. 142. The reasons for the judgment in appeal will be reported in due course.]

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[IN BANKRUPTCY.]

Oct. 6.

RE McKAY.

Bankruptcy—Composition Arrangement—Election of Debtor to Retain for Remainder of Term Premises Held under Lease—Provision in Lease for Forfeiture in Event of Lessee Taking Benefit of Act in Force for Bankrupt or Insolvent Debtors—Bankruptcy Act Coming into Operation during Currency of Lease—Application to Existing Lease—Notice of Intention to Retain Possession under sec. 13 of Act—Effect of sec. 13 (5) and sec. 52 (5)—Waiver of Forfeiture by Receipt of Rent.

A lease of land for a term of 10 years from the 1st March, 1915, contained a provision that "if the lessee shall make any assignment for the benefit of creditors or become bankrupt or insolvent or shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors . . . the said term shall immediately become forfeited and void." In March, 1921, a meeting of the lessee's creditors was called by an authorised trustee under the provisions of sec. 13 of the Bankruptcy Act, for the purpose of considering a proposal by the lessee for a composition in satisfaction of his debts. The meeting was held and the proposal was accepted by the requisite majority of his creditors, and approved by an order of the Court. In April, 1921, the trustee and the lessee gave the lessors notice of intention to retain the demised premises for the whole of the unexpired term. Rent was paid regularly, by cheques signed by the lessee and the trustee, on the 1st day of each month from April to September, 1921, and, with the exception of the September gale, accepted by the lessors. The composition with the creditors was duly carried out and completed by the 21st June, 1921. In August, 1921, the lessee and the trustee requested the lessors to consent to an assignment of the unexpired term to a municipal body. Upon a motion by the lessors for an order declaring the notice of election to retain the demised premises void, and that the lease had in March, 1921, become forfeited and void under the provision for forfeiture above quoted, it was admitted that the submission by the lessee of a proposal for a composition under sec. 13 brought him within the provision for forfeiture, in that he was thereby taking the benefit of an Act in force for bankrupt or insolvent debtors:—

Held, that the Bankruptcy Act applied to debts and contracts (including leases) existing when it came into force.

In re Athlumney, [1898] 2 Q.B. 547, *Waugh v. Middleton* (1853), 22 L.J.N.S. Ex. 109, and *Gillmore v. Shooter* (1678), 2 Mod. 310, distinguished.

Held, also, that the provisions of sub-sec. 15 of sec. 13 of the Act extend the provisions of sub-sec. 5 of sec. 52 to all cases where proceedings are taken under sec. 13, so as to enable either the trustee or the debtor himself to overcome the forfeiture which would otherwise have been effected and to elect to retain the demised premises for the whole or any part of the unexpired term.

Distinctions between the English and Canadian Bankruptcy Acts pointed out.

If the construction thus put upon the provisions of the Canadian Act was wrong, the lessors had waived the forfeiture by (with a full knowledge of the circumstances) accepting rent after having received notice of the election to retain the premises.

Straus Land Corporation Limited v. International Hotel Windsor Limited (1919), 45 O.L.R. 145, followed.

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MOTION by the L. R. Steel Company, the owners of the reversion in the premises leased to Arthur Alexander McKay, the debtor, for an order declaring that the notices given by the debtor and the trustee of their election to retain the demised premises were null and void and that the leases became forfeited and void on or about the 1st March, 1921, under provisions for forfeiture contained in the leases, by reason of proceedings taken by the debtor under sec. 13 of the Bankruptcy Act.

September 26. The motion was heard by ORDE, J., in Chambers.

J. W. Bain, K.C., and *Everard Bristol*, for the L. R. Steel Company.

R. McKay, K.C., for the trustee and the debtor.

October 6. ORDE, J.:—On the 27th February, 1915, Arthur Alexander McKay, of Hamilton, who carried on business under the name of R. McKay & Co., became the tenant under two indentures of leases of two adjoining parcels of land for a term of 10 years from the 1st March, 1915. Each lease contained the following provision: "And it is further agreed that if the term hereby granted or any of the goods and chattels of the lessee shall at any time during the said term be seized or taken in execution or in attachment by any creditor of the said lessee or his assigns or if a writ of execution shall issue against the goods and chattels of the lessee or his assigns or if the lessee or his assigns shall make any assignment for the benefit of creditors or become bankrupt or insolvent or shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors then and in every such case . . . the said term shall immediately become forfeited and void and the lessors shall have the same right to enter as is hereinafter given to them in the event of non-payment of rent or non-performance of covenants." The reversions in the demised premises were subsequently, but prior to the month of April, 1921, conveyed to the L. R. Steel Company Limited.

On the 21st March, 1921, a meeting of McKay's creditors was held, called by an authorised trustee under the provisions of sec. 13 of the Bankruptcy Act, for the purpose of considering

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a proposal by McKay for a composition in satisfaction of his debts. The proposal was accepted by the requisite majority of his creditors, and was approved by an order of the Court on the 1st April, 1921.

On the 14th April, 1921, the trustee gave to the L. R. Steel Company Limited formal notice of his intention to retain the demised premises for the whole of the unexpired terms, and on the 18th April, 1921, McKay, the arranging debtor, gave a similar notice, and on the same day the trustee and McKay, jointly, gave notice whereby each adopted the service of the notice of retainer given by the other.

The L. R. Steel Company Limited attended the meeting of creditors on the 21st March, 1921, but were excluded therefrom and took no part therein, and no notice was given to them of the result of the meeting or of the order approving of the acceptance of the proposal, except in so far as the notices of the 14th and 18th April may have constituted such notice to them.

Notwithstanding the position now taken by the L. R. Steel Company, rent was paid regularly on the 1st day of each month from April to September, both inclusive, to the agents of the L. R. Steel Company; and (with the exception of the payment made on the 1st September, 1921, which has been retained by the agents pending the result of this motion) the rents were duly paid over by such agents to the Steel company and accepted by them without objection or protest. The cheques for the monthly instalments of rent were all signed by McKay and by the trustee.

The composition with the creditors was duly carried out and completed by the 21st June, 1921. On the 15th August, 1921, McKay and the trustee requested the L. R. Steel Company to consent to an assignment of the unexpired terms under both leases to the Hydro-Electric Commission of the City of Hamilton. This request was the first intimation that the Steel company had of the intention or desire of McKay to assign the terms.

The Steel company now move for an order declaring that the notices of the 14th and 18th April, 1921, electing to retain the demised premises, are void and of no effect, and that the leases became forfeited and void on or about the 21st March, 1921, under the provisions for forfeiture quoted above, by reason of the proceedings taken by McKay under sec. 13 of the Bankruptcy Act.

It is, I think, admitted by both parties that the submission by McKay to his creditors of a proposal for a composition under sec. 13 of the Act brings him within the provisions for forfeiture in the leases already quoted, in that he is thereby taking the benefit of an Act in force for bankrupt or insolvent debtors.

So that, unless by reason of the Bankruptcy Act McKay or the trustee is entitled to retain the demised premises, or the forfeiture has been waived, the Steel company are entitled to have the leases declared forfeited and void.

The contentions of the landlords are, first, that the Bankruptcy Act cannot operate retroactively upon the contractual rights of a landlord arising under a contract in existence before the Bankruptcy Act came into force; and, second, that if the Act can affect such rights the provisions of sub-sec. 5 of sec. 52, which give the trustee the right to retain the demised premises, are confined to cases where a receiving order has been made or the debtor has made an authorised assignment and do not extend to cases where the debtor chooses to proceed under sec. 13 without first being declared a bankrupt or making an assignment.

It is, of course, a general rule that where an enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, it shall not be construed so as to have a retroactive operation unless such a construction appears clearly in the terms of the Act or arises by necessary and distinct implication: Maxwell on Statutes, 6th ed., pp. 382, 383. There is nothing in the Bankruptcy Act, apart from special preferences given to landlords by secs. 51 and 52, to indicate that the rights of a landlord arising under a lease are to be regarded as in any way different from rights arising under any other form of contract. And if the contention of the landlords here that the Act does not apply to any lease which was in existence before the Act came into force, merely because it retroactively affects or impairs existing contractual rights, is sound, then the contention to be consistent must include all contractual rights whatsoever, so that a creditor whose debt was in existence prior to the 1st July, 1920, might claim that he was not obliged to file any proof, but might proceed to judgment against the bankrupt, and no discharge of the bankrupt would be binding upon such creditor. It is only necessary to state this proposition to shew its absurdity. That the Act applies to debts and contracts existing when it came into force is clear from its nature and the sweeping effect of its language. In addition to the general tenor of the Act, there is sec. 8, which excludes pre-existing debts from those which might otherwise have been regarded as available acts of bankruptcy or as the basis of a bankruptcy petition; but, in order to make it clear that such exclusion does not otherwise affect the operation of the Act upon such debts, the section concludes with these words: "but it shall be provable in any proceedings otherwise founded under this Part, and otherwise." If ordinary debts and contracts in existence at the time of the coming into opera-

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tion of the Act come within its scope, then I can see no reason for excluding leases.

Mr. Bain referred to *In re Athlumney*, [1898] 2 Q.B. 547; *Waugh v. Middleton* (1853), 22 L.J.N.S. Ex. 109; and *Gillmore v. Shooter* (1678), 2 Mod. 310. Both the *Athlumney* and *Waugh* cases merely establish that an amendment to a Bankruptcy Act will not be given a retroactive application so as to interfere with a scheme already adopted by the Court or so as to validate a defective compromise not theretofore binding upon a creditor. The *Athlumney* case indeed affords an answer to counsel's argument, because the Court there held that, if the scheme had not been approved by the Court before the amending Act came into force, the creditor, who had been allowed a larger rate of interest than that permitted by the amending Act, would have been bound by the amendment and restricted in his proof to the lower rate. The *Gillmore* case merely decided that the Statute of Frauds, which made certain agreements void if not in writing, did not retroactively invalidate a parol contract. I am unable to see how that case has any application here, where the Act is clearly intended to affect existing rights.

The second point raised by the landlords is much more difficult of solution. Sub-section 5 of sec. 52 enables the trustee, notwithstanding the legal effect of any provision or stipulation in any lease, where a receiving order or an authorised assignment has been made, to elect to retain the demised premises for the whole or any portion of the unexpired term. The landlord contends that this right to retain is, by the express language of the sub-section, limited to the two cases expressly mentioned, namely, where a receiving order has been made or the tenant has made an authorised assignment. If, in spite of certain other provisions of the Act, the operation of this sub-section is to be limited to those two cases, then it would seem to be clear that the tenant, by taking advantage of the Bankruptcy Act, has forfeited the terms. But counsel for the tenant contends that the provisions of sub-sec. 15 of sec. 13 extend the provisions of sub-sec. 5 of sec. 52 to all cases where proceedings are taken under sec. 13, so as to enable either the trustee or the debtor himself to overcome the forfeiture which would otherwise have been effected and to elect to retain the demised premises for the whole or any part of the unexpired term.

It may be useful here to make some comparisons between the English Bankruptcy Act and our own. There are no provisions in the English Act corresponding to those of our own as to the rights of the landlord, these being preserved to him quite independently of the Act. Nor is there any provision in the English

Act for the making by the debtor of a voluntary assignment. And, while the provisions of sec. 13 for the making by an insolvent debtor of a proposal for a composition, or for an extension of time, or for a scheme of arrangement, correspond to those in the English Act, it is not possible under the English Act for an insolvent debtor to make such a proposal until after a receiving order has been made against him. But the effect of a receiving order in England is different from that in Canada. Under our Act, where a receiving order is made, the order is coupled with an adjudication in bankruptcy, the debtor being then and there declared bankrupt, and there immediately follows upon such declaration the vesting of the bankrupt's property in the trustee. In England the first step in bankruptcy proceedings is the making of the receiving order, which may be made, as here, either upon the petition of a creditor or of the debtor himself, but there is not an immediate adjudication in bankruptcy, and the receiving order does not divest the bankrupt of his property. Following the receiving order, the debtor may or may not make a proposal for a composition or an extension or a scheme of arrangement. If such a proposal is made and is accepted and carried out, the effect is, as it is under our Act, to discharge the insolvent. And, if no such proposal is made, or, if made, is not accepted or approved, an adjudication in bankruptcy follows almost inevitably, and there is an immediate vesting of the bankrupt's property or estate in the trustee, just as in Canada a receiving order and adjudication of bankruptcy and an immediate vesting in the trustee follow the rejection of the proposal. These distinctions, however, in my judgment, are mere differences in procedure, the ultimate result being in effect the same, namely, the distribution of the insolvent's estate equitably among his creditors, either through the medium of an adjudication in bankruptcy or of a composition or extension of time or a scheme of arrangement or by the voluntary assignment of the debtor's property to a trustee for distribution among his creditors; and all these different methods of procedure have the common end in that they result, or are intended to result, in the bankrupt's or insolvent's discharge from all further liability to his creditors. Notwithstanding the fact that under the Canadian Act an insolvent person may take steps to submit a proposal for a composition or extension to his creditors under sec. 13 without any previous application to the Court for a receiving order or without having made a voluntary assignment to a trustee, the proceedings under sec. 13 are, in my judgment, proceedings in bankruptcy having for their object substantially the same result as if an assignment or a receiving order had been made; and 1

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can see no reason, except where the Act otherwise provides, for considering that the procedure under sec. 13 is something merely engrafted upon the Act and not a proceeding in bankruptcy, especially when a course of procedure almost substantially the same is also provided under the English Bankruptcy Act as a step which in the ordinary course may logically follow the making of a receiving order. There is also a parallel to be observed between the effect of the procedure under sec. 13 of our Act and that under the English Act, namely, that in neither case is the property of the debtor divested from him until, in Canada, a receiving order or an assignment is afterwards made, or in England an adjudication in bankruptcy takes place. And there is the further point to be observed, that the procedure under sec. 13 is equally applicable whether an assignment or a receiving order has been made or not.

If sub-sec. 5 of sec. 52 has the effect of overriding the provisions for forfeiture in a lease, where a receiving order or an authorised assignment has been made, there seems to be no logical reason, so far as any principle is concerned, why the tenant or the trustee or the creditors should be placed in any different position where a proposal for a composition is made under sec. 13 without a receiving order or an assignment having been made. If sub-sec. 5 of sec. 52 were to be construed by itself, I should be forced to assume that the case of an independent proposal made under sec. 13 had been either intentionally or inadvertently omitted and might feel bound to give effect to the contention of the landlords. But it was argued on behalf of the trustee and of the tenant that the provisions of sub-sec. 15 of sec. 13, that the terms "trustee," "bankruptcy," etc., shall include respectively "a composition, extension or scheme of arrangement, a compounding, extending or arranging debtor and an order approving the composition, extension or scheme," in applying all parts of the Act to the terms of the composition, extension, or scheme, enlarge the operation of sub-sec. 5 of sec. 52. It must be admitted that sub-sec. 15 of sec. 13 is not skilfully drawn. It is based on a corresponding provision of the English Act, but the addition of certain words in our section destroys its symmetry. Notwithstanding this, I think it is plain that the intention of sub-sec. 15 is to make all parts of the Act apply in cases where the debtor has made a proposal under sec. 13 so as to avoid a continuous repetition of certain terms, and I can see no reason why sub-sec. 5 of sec. 52 should not be included within the scope of sub-sec. 15 of sec. 13. It was argued that any application of sub-sec. 15 of sec. 13 should be limited to those cases where it was one of the terms of the composition, extension, or

scheme of arrangement that the trustee should be entitled to elect to retain the demised premises under sub-sec. 5 of sec. 52, but I think the practical effect of any such limitation would be to nullify completely in the great majority of cases any application whatever of sub-sec. 15 of sec. 13.

It was urged, and with some force, that the intention of sub-sec. 5 of sec. 52 was merely to enable the trustee to retain the demised premises for the unexpired term for the benefit of the creditors, and that the right could not be exercised for the benefit of the debtor himself, and that in the present case the trustee or the debtor is exercising the right to retain for the benefit of the debtor alone. In a sense this may seem to be true, but it is impossible to say to what extent the retention of the demised premises, even by the debtor himself, may not be a factor in the proposal made by the debtor under sec. 13, or in its acceptance by the creditors. There may be many cases in which the retention of the demised premises may be absolutely necessary to enable the debtor to carry out and complete a composition or a scheme of arrangement. If any other construction of sub-sec. 5 of sec. 52 is to prevail, it would mean that, in order to avoid the forfeiture which would result from an independent proposal under sec. 13, the debtor would simply go through the formality of making a voluntary assignment under sec. 9, which would be followed by the proposal, and the result would be the same in either case. I cannot think that the Act was intended to bring about any different result in the two cases; and I am clearly of the opinion that the effect of sub-sec. 5 of sec. 52 is to override the provisions for forfeiture contained in the leases and to enable the trustee or the debtor himself to elect to retain the demised premises for the remainder of the term.

In the present case, even if my construction of sub-sec. 5 of sec. 52 is wrong, the landlords have waived the forfeiture by accepting rent after having received notice of the election to retain the premises. The landlords were fully aware, by reason of the notice calling the meeting of the creditors, of the fact that their tenant had brought himself within the provisions of the Bankruptcy Act and the forfeiture clause in the leases. Notwithstanding such notice, they have accepted rent for a period of several months without any objection or protest. It was argued on behalf of the landlords that this rent was accepted on the theory that the trustee was simply remaining in possession pending the acceptance and the completion of the composition, and that the rent was being paid merely as occupation rent for the period which the trustee might continue to occupy the premises for such purposes. This argument would have some weight if

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the landlords were in ignorance of the reason for the occupation of the demised premises, but they cannot plead such ignorance in view of the fact that in April last they received formal notice of the intention to retain the premises for the remainder of the terms. That the acceptance of such rent with a full knowledge of the circumstances under which it was paid constitutes a waiver of the right to forfeit the leases, is clear: *Straus Land Corporation Limited v. International Hotel Windsor Limited* (1919), 45 O.L.R. 145, 48 D.L.R. 519.

On both grounds, therefore, I am of opinion that the L. R. Steel Company Limited have failed upon their motion, which will be dismissed with costs. The order should contain a declaration that the leases have not become forfeited or void by reason of the proceedings taken by the tenant under the Bankruptcy Act.

[APPELLATE DIVISION.]

ANDERSON V. BRADLEY.

1921.

Mar. 1.

Oct. 7.

Fraudulent Conveyance—Deed of Land by Father to Daughter—Action by Creditor of (Deceased) Grantor to Set aside—Conveyance Voluntary on Face—Attempt to Shew Consideration—Advance Made by Husband of Grantee—Undertaking to Maintain Grantor and Wife for Life—Corroboration—Necessity for—Ontario Evidence Act, sec. 12—Intent to Defeat Creditors.

In April, 1917, S., being then insolvent, conveyed his house and land to his married daughter, in consideration of parental love and affection and the sum of one dollar. The deed (which was registered) contained a covenant by the grantee to allow the grantor and his wife a home on the land for their lives and the life of the survivor. The husband of the grantee had in 1914 advanced \$600 to S., which had not been repaid. In July, 1920, after the death of S., the property was sold for \$3,000 and conveyed to the purchaser. In an action brought by a creditor of S. against S.'s daughter, her husband, and S.'s widow, for a declaration that the conveyance of 1917 was made with intent to defeat, hinder, and delay the creditors of S., and that the \$3,000 paid by the purchaser was an asset of the estate of S. available for the benefit of his creditors, the defendants alleged that the advance of \$600 was made on the promise or understanding that S. would convey the house and land to his daughter, subject to the condition that S. and his wife were to be maintained during their lives. The son-in-law in the witness-box admitted on cross-examination that he wanted to get the property for his wife because he was afraid that he and his wife might lose it, and he said that he also wished to secure the \$600:—

Held, that the defendants had failed to establish that there was any consideration for the conveyance of 1917; that it was voluntary, and was given with intent to defeat, hinder, and delay the plaintiff and other creditors of S.; and that the \$3,000 was available for their benefit.

Subject of corroborative evidence in such a case discussed.

THIS action was brought by the plaintiff, on behalf of himself and all other creditors of the estate of one Robert Sproule, deceased, against Phœbe Margaret Bradley (a daughter of the late Robert Sproule), Luther Bradley (her husband), and Jane Ann Sproule (the widow of Robert Sproule), for a declaration that a conveyance made on the 14th April, 1917, by Robert Sproule to Phœbe Margaret Bradley of lots 8 and 9 on the south side of Elliott street in the village of Cannington, was made with intent to defeat, hinder, and delay his creditors, and that the sum of \$5,000 paid by the purchaser thereof was an asset of the estate of Robert Sproule available for the benefit of his creditors; and for other incidental relief.

November 8, 1920. The action was tried by ORDE, J., without a jury, at Lindsay.

R. J. McLaughlin, K.C., and *J. E. Anderson*, for the plaintiff.
J. M. Ferguson, for the defendants.

March 1, 1921. ORDE, J.:—The late Robert Sproule had been originally a farmer, but for about 30 years before his death had lived in Cannington, where he carried on a small fur business. The business never prospered, and when he died on the 20th March, 1920, he was insolvent.

On the 7th June, 1915, the plaintiff lent Sproule \$225, taking a 12 months' note, with interest at 7 per cent. Sproule paid the interest regularly to the 5th August, 1919. On the 29th December, 1915, the plaintiff lent Sproule a further \$200 upon the same terms, upon which interest was paid to December, 1919. Evidence was also given of loans made by other persons to Sproule both before and after April 1917. One Philip Dawson lent him \$400 in 1916, and in 1917 and 1919 further sums to the amount of \$600, making in all \$1,000 owing to Dawson at the date of Sproule's death. There were also loans by others within a year before his death.

Sproule's business was not of a substantial character, and when he died he apparently had no business assets whatever. He lived in a house in Cannington built upon two lots which he had purchased in 1888. His daughter, the defendant Phœbe Margaret Bradley, for some time after her marriage had lived with her husband, the defendant Luther Bradley, on his farm in East Whitby, but about 16 years ago, her mother, the defendant Jane Ann Sproule, was taken ill, and the Bradleys gave up their farm and came to Cannington to live with the Sproules. According to the evidence of the Bradleys, it was arranged with Sproule

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that the Bradleys were to bear half the expense of the house, including the taxes, but that Bradley was to pay for any improvements to the house. Bradley says that in 1914 he advanced \$600 to Sproule on the understanding that the latter was to convey the house to Phoebe Bradley, but subject to the condition that Sproule and his wife were to be maintained during their lives. Bradley says that he had to borrow \$300 from the Home Bank and \$300 from his mother to enable him to lend the \$600 to Sproule. Sproule required the money to pay a note for \$600 held by the Standard Bank, and Bradley says he paid the money to the bank, took the note home, and one day, when clearing up, he burned it. He did not get the deed from Sproule in 1914, due he says to his own carelessness. In 1916, he says, the arrangement as to sharing the household expenses was changed and from then onwards he and Mrs. Bradley assumed all the burden of caring for Mr. and Mrs. Sproule. Sproule was then about 81 years of age and Mrs. Sproule about 84. Bradley says that even prior to the alteration in the arrangement made in 1916 he had been bearing a good deal of the household expenses, but that after that date he bore it wholly, and he estimates his expenditure upon Mr. and Mrs. Sproule for board and clothing and doctors' bills at from \$500 to \$600 per annum. He spoke to Sproule once or twice after the loan of \$600, and asked him if this "fixed everything up," by which he doubtless meant, "if that paid everything Sproule owed." Sproule said it did.

In 1917 Bradley, wanting to get matters "straightened out," asked Sproule for the deed, and accordingly on the 14th April, 1917, Sproule and his wife executed a conveyance of the property to Phoebe Margaret Bradley in fee simple, in consideration of parental love and affection and the sum of one dollar. The habendum is followed by this clause, "and subject also to the said grantor and his said wife and the survivor of them having and enjoying a comfortable and peaceable home on the said lands and premises so long as they or either of them live." And the grantee also covenants "to allow the said grantor and his said wife to have and enjoy a comfortable and peaceable home on said lands and premises as aforesaid," and the bar of dower by Mrs. Sproule is made "subject to the full enjoyment of a comfortable and peaceable home on the said lands and premises as long as she may live." The deed was registered on the 17th April, 1917, but there was no outward or visible change in the occupation of the house, nor did Bradley or his wife or Sproule notify the assessor, the assessment continuing as before in the name of Robert Sproule. Upon his examination for discovery, Bradley had said that the \$600 was advanced to Sproule in 1916, but in his cross-

examination he explains that upon looking up the bank records he found he was mistaken and that the loan was made in 1914. The manager of the Standard Bank says that the bank records shew that in December, 1912, Sproule was indebted to the bank upon a note endorsed by one Wilson for \$600, and that this was renewed from time to time, the debt being finally paid on the 26th July, 1914. One peculiar feature about this transaction is that the bank records shew that Bradley's name appeared in the liability record on the occasion of the last renewal. Bradley does not explain this, but he says that the reason Sproule had to have the money was that Wilson refused to endorse any further renewals, and it may be that Bradley endorsed for Sproule pending the raising of the money. The records of the Home Bank shew an advance of \$300 to Bradley in July, 1914, and Howard Bradley, his brother, says that he went to the bank in Oshawa and got \$300 for his mother in the summer of 1914. The elder Mrs. Bradley is now dead, so that it is not possible to corroborate Luther Bradley's statement that he borrowed \$300 from his mother. Phœbe Bradley says that the deed was handed to her husband and herself, and was kept in a box in a clothes closet in their bedroom. She corroborates her husband as to their having supported her father and mother during the past 4 years.

It was agreed by counsel that the examination for discovery of Mrs. Sproule should be treated as evidence given by her at the trial. She says she knew nothing about the \$600 advance or about the arrangement as to the deed. The first she knew about the deed was Mr. Sproule's telling her that he was going to give the place over to Luther and Phœbe, and the latter were to support them while they lived. Nothing was said then about the \$600 loan. Mr. Hart, the conveyancer who drew the deed and witnessed its execution, says he drew it upon instructions received from Mr. Sproule. Nothing was said to him about the \$600.

Bradley says he knew nothing of Sproule's fur business, that he knew nothing of Sproule's having any debts until after the deed had been signed, and that it was about two years ago that he first learned that Sproule owed Dawson some money. But he admits on cross-examination that he wanted to get the house for his wife because he was afraid he and his wife might lose it and also that he wished to secure the \$600.

On the 20th July, 1920, after Sproule's death, the property was conveyed to one Johnston for \$3,000. There was some correspondence between the solicitors for the parties to this action a few days before this, and it is suggested that the sale to Johnston was hurried through to avoid the issue of the writ and the registration of a certificate of *lis pendens*. Bradley denies this and

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says that the negotiations for the sale had begun 10 days after Sproule's death, but that they did not wish to close with Johnston until they had succeeded in getting another house in Orillia, where the Bradleys now live with Mrs. Sproule.

If Bradley were seeking to establish a claim to the \$600 which he says he advanced to Sproule in 1914, against Sproule's estate, he could not succeed, because there is not in my judgment sufficient corroboration of his statement to establish the claim. The evidence of the bank manager that a note for \$600, upon which Bradley and Sproule were liable, was paid in 1914, adds no weight to Bradley's statement whatever, as it does not appear that it was Bradley who made the payment. Mrs. Bradley says that she remembers Bradley speaking to her about the \$600 and she remembers a note for \$600 being put in the box in which she and Bradley kept their papers, but she does not identify the note in any way and does not say that it was Sproule's note.

Section 12 of the Evidence Act (R.S.O. 1914, ch. 76) requires corroboration in an action "against the heirs, next of kin, executors, administrators, or assigns of a deceased person." This is not an action of that character, but the provisions of sec. 12 are in reality a declaration of the law and practice which had prevailed prior to the legislation. There was some doubt in England (where the rule has not been made the subject of legislation, as it has been here) as to whether the rule was one of law or of practice, but it seems now to be regarded as one of practice. Notwithstanding the fact that this is not an action by or against the estate of a deceased person, the principle applicable to the weight to be given to Luther Bradley's uncorroborated statement as to the advance or payment of \$600 to the deceased, in a contest with the creditors of the deceased, ought to be precisely the same as if the claim were against the estate of the deceased. And I find that this rule has been applied in cases of this character: *Merchants Bank v. Clarke* (1871), 18 Gr. 594; *Morton v. Nihan* (1880), 5 A.R. 20.

There being therefore no evidence to corroborate Bradley as to the \$600 advance, I am unable to consider it as any consideration whatever for the deed in question, which must stand, if it can stand at all, upon the alleged arrangement that the Bradleys would assume the whole obligation of maintaining the household during the lives of Mr. and Mrs. Sproule.

So far as the deed itself is concerned, it is a voluntary one. There is no covenant on the part of the grantee to maintain the Sproules, or even any implied obligation to do so. The provision that the grantor and his wife shall have and enjoy a comfortable and peaceable home on the lands is in reality nothing

more than a reservation in their favour, and the covenant of the grantee to allow the Sproules to have and enjoy a comfortable and peaceable home on the lands does not carry the reservation any farther. There is not involved either in the reservation or in the covenant any consideration passing from the grantee to the grantor. The retention by Mr. and Mrs. Sproule of a comfortable and peaceable home is nothing more than an exception from the grant. The grantee takes what is left; she is not giving anything in exchange.

It is contended, however, by the defendants, that the agreement to maintain the Sproules alleged to have been made in 1916 constituted sufficient consideration for the conveyance. As the deed itself does not express this consideration, it is important to examine carefully the evidence upon which the contention is based. Bradley says that the arrangement was made between himself and Sproule in the early part of 1916. In making the bargain it may be assumed that Bradley was acting for his wife, to whom the lands were ultimately conveyed. There is nothing in her evidence which really corroborates her husband's story as to the bargain. It is true that she says that a change took place in the household arrangements, but her evidence does not connect that fact with any arrangement that her father was to convey the land to her. Mrs. Sproule, in her examination for discovery, which by agreement was treated as her evidence, says that she knew nothing about any arrangement until the spring of 1917, when she was asked to join in executing the deed; that her husband came in two or three hours before Mr. Hart, the conveyancer, came, and told her that Mr. Hart was coming, and then he said, "I am going to give the place over to Luther and Phœbe, and they are to support us while we live." Later she says that her husband did not say why he was making it over to Bradley and his wife; "said 'making it over,' and we were to have a comfortable living while we lived with them." She knew nothing as to the \$600 loan. Asked as to the change in the arrangements, she says that the taking over of the complete burden of the household expenses by the Bradleys followed the execution of the deed, but she admits that her memory is weak in regard to that. Her evidence in that respect contradicts that of Bradley, who says the change in the arrangements took place in 1916.

Apart from Mrs. Sproule's statement as to what her husband told her when she was asked to sign the deed, there is no corroboration of Bradley's evidence as to the agreement to maintain the Sproules being made the consideration for the promise by

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Sproule to convey the lands to his daughter. The necessity for corroboration does not rest upon quite the same footing as that required when proving a claim against the estate of a deceased person, which has already been discussed with regard to the alleged \$600 advance, but upon the principle to which effect was given in *Koop v. Smith* (1915), 51 Can. S.C.R. 554, 25 D.L.R. 355, that when a conveyance between near relations is impeached as being a fraud on creditors, and the circumstances attending its execution are such as to arouse suspicion, the Court may, as a matter of prudence, exact corroborative evidence in support of the reality of the consideration and the *bona fides* of the transaction. If the alleged bargain had been made simultaneously with the execution of the deed, Mrs. Sproule's evidence might have afforded some corroboration of it, but the bargain is alleged to have been made the year before, and Mrs. Sproule knew nothing of it. I find it difficult to accept her evidence as sufficiently corroborating Bradley's story, in view of all the surrounding circumstances. Bradley alleges a definite agreement in 1916, the terms of which were explicit. Notwithstanding that, he accepts from Sproule, a year later, a deed which does not incorporate all the terms of the agreement and which on its face is a purely voluntary conveyance. The burden of shewing the real nature of the transaction which rests upon the defendants is, in my judgment, increased by the fact that, with all the terms of the bargain in mind, the grantee does not insist upon incorporating them in the deed, but accepts a deed which is silent as to the obligation to maintain the Sproules. Bradley admits that one of his reasons for accepting the deed was that he was afraid he and his wife might lose the property. While the existence of a desire to prevent the property from falling into the hands of creditors is not in itself a ground for setting aside a conveyance which can be otherwise supported (*Gibbons v. Tomlinson* (1891), 21 O.R. 489, at p. 497, and *Bank of Montreal v. Stair* (1918), 44 O.L.R. 79, at p. 83), yet, when the evidence of the consideration upon which the grantee seeks to support a conveyance, voluntary on its face, is so weak as it is here, the desire to secure the property may well be regarded as the real motive for the transaction.

For these reasons, I hold that the defendants have failed to establish that there was any consideration for the conveyance, and that the same was voluntary and was given with intent to defeat, delay, and hinder the plaintiff and the other creditors of the deceased, and that the \$3,000 for which the lands were sold by the defendants is an asset of the estate of the deceased available for the benefit of the plaintiff and other creditors of the

deceased. The defendants Phœbe Bradley and Luther Bradley should be directed to pay the sum of \$3,000, with interest from the date when they received it, into Court, and there should be a reference to the Local Master at Lindsay to receive and adjudicate upon the claims of the plaintiff and the other creditors of the deceased entitled to the benefit of this judgment, and to report. The claim of Jane Ann Sproule, the widow of the deceased, to her dower interest in the proceeds of the sale, must be preserved and be dealt with by the Local Master, and this judgment should not prejudice the defendants upon the reference as to any objections they may take that all or any portion of the claim of any creditor is not entitled to the benefit of this judgment, on the ground that it arose subsequent to the conveyance in question.

The costs of the trial will be paid by the defendants. The costs of the reference will be dealt with by the Master.

The defendants appealed from the judgment of ORDE, J.

September 22. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

J. M. Ferguson, K.C., for the appellants, argued that the evidence shewed that there had been no fraud, and that there had been valuable consideration, namely, the agreement to maintain the Sproules. The learned trial Judge had not found that there was *mala fides*, but had said that he could not get over the fact that there was no corroboration of Luther Bradley's story as to the \$600 advance. There was no rule of law requiring such corroboration. In any event there was corroboration.

R. J. McLaughlin, K.C., and *J. E. Anderson*, for the plaintiff, respondent, contended that there was an atmosphere of suspicion in the whole transaction; and so the learned Judge at the trial was right in requiring corroboration: *Koop v. Smith*, 25 D.L.R. 355, 51 Can. S.C.R. 554. The deed was void as being voluntary. A debtor could not give away his creditors' money by a reservation in a deed for his own benefit. Bradley's statement as to making an agreement to support the old people was contradicted by the fact that he did not start to support them until 1916. Bradley admitted that he tried to save the house owing to the risks of the fur business. All the badges of fraud were present. On the question of the deed being voluntary, counsel referred to *McGuire v. Ottawa Wine Vaults Co.* (1913), 48 Can. S.C.R. 44, 13 D.L.R. 81, and *Merchants Bank v. Clarke*, 18 Gr. 594. On the question of corroboration he referred to *Gignac v. Iler*

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App. Div. (1898), 29 O.R. 147, 25 A.R. 393, and *Strong v. Strong* (1854),
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Ferguson, in reply.

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October 7. MEREDITH, C.J.C.P.:—The direct effect of the deed in question was to transfer to the male defendant all the property, of any real value, of his father-in-law, leaving nothing for creditors, present or future, with the exception of the father-in-law's bankers, who were to be or had been paid \$600 by the son-in-law.

Commonly the parties to such a transaction should be held to have had the intention to do that which was the result of it; that is, have intended to defeat creditors: and so the judgment in question should stand: see *Spirett v. Willows* (1864), 3 DeG. J. & S. 293; and *Freeman v. Pope* (1870), L.R. 5 Ch. 538.

But, quite apart from such imputation, and apart from anything that the testimony discloses, the case seems to me to be a plain one of intent to defraud creditors.

The property in question was the home of the father-in-law; and he and his wife, for many years and up to the time of his death, lived there. For several years before the making of the deed in question, their daughter and her husband—the main defendants in this action—had lived with them; and, after the making of the deed until the father-in-law's death, there was no apparent change in that state of affairs. The father-in-law was not decrepit, nor was there anything in his mental or physical condition that made any change in that state of affairs necessary. He had kept, and still continued to keep, a small retail fur "store:" a business which the son-in-law was obliged to describe as precarious—to make it appear that the father-in-law's large indebtedness at the time of his death is attributable to subsequent losses in it.

Nothing in any of the other circumstances of the case shews any cause for the transfer of the property; except that which all the circumstances point to—that the purpose was to save the property from creditors.

The fact that the bankers were to be paid \$600 gives no support to the deed: the bankers had to be pacified to enable the father-in-law to carry on his business: and a mortgage would have been the usual and proper way of securing the bankers, or the son-in-law if he demanded security.

The assertion that the son-in-law was to support his father-in-law and mother-in-law is opposed to the plain words of the deed and to all the circumstances of the case and is quite as

unbelievable by me as it was by the trial Judge. If that were the consideration for the deed, what are we to think of all the parties to it and of the conveyancer who drew it, the plainly expressed consideration being natural love and affection only?

If the man were feeble in mind or body, too old or too ill to look after his own affairs, there might be some ground for giving some effect to a repudiation of the plainly expressed purposes of the deed; but, when he was mentally and bodily able to continue carrying on his mercantile business and to incur debts just as he had done before, I must decline to give any weight to such a repudiation.

The case, even thus far only, seems to me to be a very plain one of a deed made for the purpose of defeating creditors, present and future; of keeping the property in the family in case creditors should desire it for the payment of their debts. What other reason could there be? In the ordinary course of events the family would have continued to live together, and the father-in-law would have disposed of his property by his will: not have denuded himself and his wife of all they had, and have left them dependent upon the charity of their daughter and her husband, who, with the deed as it is, could very easily have defended themselves against any claim for maintenance; though probably not against an action to set aside the deed on the ground of improvidence.

Then, coming to the testimony adduced at the trial, we find that these views of the transaction are substantiated by the son-in-law himself, who, in the most unmistakable manner possible, swore, at the trial, that the deed was made for the purpose of defeating his father-in-law's creditors: what reason, what excuse indeed, can there be for further discussion?

I am in favour of dismissing the appeal; and do not perceive how any useful purpose would be gained in discussing the reasons given by the trial Judge, which, though not expressed just as I think would have been best, are, in my opinion, generally speaking, right. The learned Judge did not say that corroboration was necessary to support the transaction in question: he did say that if the defendant Bradley were suing to recover the money said to have been paid by him to the bank for the now deceased father-in-law at his request, corroboration would be necessary.

RIDDELL, J.:—Upon the argument of this appeal I was inclined to think that sufficient was made to appear to support the transaction in question, when properly interpreted.

But a careful and repeated perusal of the evidence has con-

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vinced me that the defendant has himself by his testimony made it impossible.

I do not agree with the somewhat stringent view of my learned brother Orde as to the necessity of corroboration in this case; but it is unnecessary here to discuss the law in that regard, as, in any aspect of the defendants' evidence, the appeal fails.

MIDDLETON, J.:—Appeal from the judgment of Mr. Justice Orde, pronounced at the trial of the action, setting aside the conveyance complained of.

I have considered this matter with great care, because there was much in the argument of Mr. Ferguson calling for careful consideration. In the result, however, I have come to the conclusion that the appeal should be dismissed.

The conveyance is dated the 17th April, 1917, and purports to be in consideration of parental love and affection and the sum of \$1 of lawful money. There is no provision for maintenance. At the time of the conveyance, there is no doubt, the grantor was hopelessly insolvent. In the statement of defence filed, the defendant sets up that in August, 1916, he agreed to advance to his father-in-law \$600 to clear his then existing debts, and that he also agreed to maintain his father-in-law and his wife for the term of their natural lives.

The evidence discloses that the advance of \$600 was not made in 1916, but in 1914, and the evidence as to the obligation to support and maintain is most unsatisfactory.

My learned brother has based his judgment largely upon what I think is an erroneous view of the law, holding that in actions such as this, where the grantor is dead, it is necessary for the evidence of the grantee to be corroborated. This is not the true effect of the statute. Corroboration is required where the action is by or against the estate of a deceased person. This action does not fall within the terms of the statute. The action is by the creditor of the deceased person against the grantee of the deceased person.

The true situation is, I think, well indicated in the judgment of Sir J. Hannen in the case of *In re Hodgson* (1885), 31 Ch. D. 177, where he says (at p. 183):—

“Now, it is said on behalf of the defendants that this evidence is not to be accepted by the Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living

man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon."

I would also refer to the views of Sir W. M. James, L.J., in *Hill v. Wilson* (1873), L.R. 8 Ch. 888, at p. 900, where he indicated the great caution necessary before uncorroborated evidence can be accepted to alter or vary a written document, particularly where the other party to the transaction is dead.

In this case there are many circumstances of suspicion. It seems to me to be impossible to credit the statement that the \$600 was advanced on the faith of the promise suggested. I think the truth may be more accurately gleaned from the evidence of the defendant's wife and of his mother-in-law, which fails to corroborate the evidence of the defendant in this respect. The more reasonable view is that the money having been advanced, as no doubt it was, and not having been repaid, the defendant became apprehensive of its loss, and that the conveyance was the result of an endeavour to protect the grantor from the risks of the mercantile business he was carrying on. The truth is substantially told by the defendant at p. 30 of the notes of evidence, where he says that he knew that the old gentleman was in a mercantile trading business, and then he is asked:—

"Q. You deliberately refrained from asking him whether he had any other debts or not? A. Mr. Sproule was a very close man about his business.

"Q. You wanted to get the house for your wife? Wanted to see that it was secured to her? A. I did.

"Q. That it would not be lost? A. I did.

"Q. And you were afraid if he went on in the fur business you might lose it? A. Yes.

"Q. That was your reason for the anxiety to get this house? A. That and to secure my \$600.

"Q. And to see that the house would not be lost through the risk of the fur business? A. Yes.

"Q. And secured to your wife at all hazards? A. Secured to my wife."

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The defendant admits that at the time of the conveyance, and at the time of the advance of the \$600, he knew that this left his father-in-law absolutely impecunious.

The appeal will therefore be dismissed with costs.

LATCHFORD and LENNOX, JJ., agreed in the result.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Way—Grant of Right of Way—Easement—Substantial Obstruction—Overhanging Structure—Absence of Present Inconvenience—Apprehension of Future Inconvenience.

The obstruction of a private right of way is not actionable unless there is a real, substantial interference with the enjoyment of it.

The plaintiffs, the owners of a parcel of land, had also, by grant, a right of way "at all times and for all purposes in common with all other persons entitled thereto in over and upon" a 20-foot strip of land extending westerly from the plaintiffs' property to a public lane. The defendant owned a parcel of land extending northerly to this lane. Upon this, and covering the whole of it, he erected a building, with a fire-escape projecting over the way 3 feet 4½ inches, and a ladder projecting about a foot. The fire-escape was 7 feet 6 inches above the surface of the ground, and was supported on iron brackets sloping from the outer edge of the wall of the building. It was not shewn that this projecting structure had actually caused any inconvenience to the plaintiffs:—

Held, nevertheless, that it was a substantial interference with and obstruction of the plaintiffs' right of way, and that they were entitled to have it removed.

Sketchley v. Berger (1893), 59 L.T.R. 754, and *Clifford v. Hoare* (1874), L.R. 9 C.P. 362, followed.

Per MIDDLETON, J.:—Where the structure is permanent in its nature, the person complaining of it, if he does not assert his rights, may be taken to have abandoned them and to have so acquiesced in the thing complained of as to prevent him from afterwards asserting his rights.

Judgment of ROSE, J., reversed.

IN this action the executors of the will of John Albert Devaney, deceased, claimed damages for and an injunction against the obstruction of a right of way.

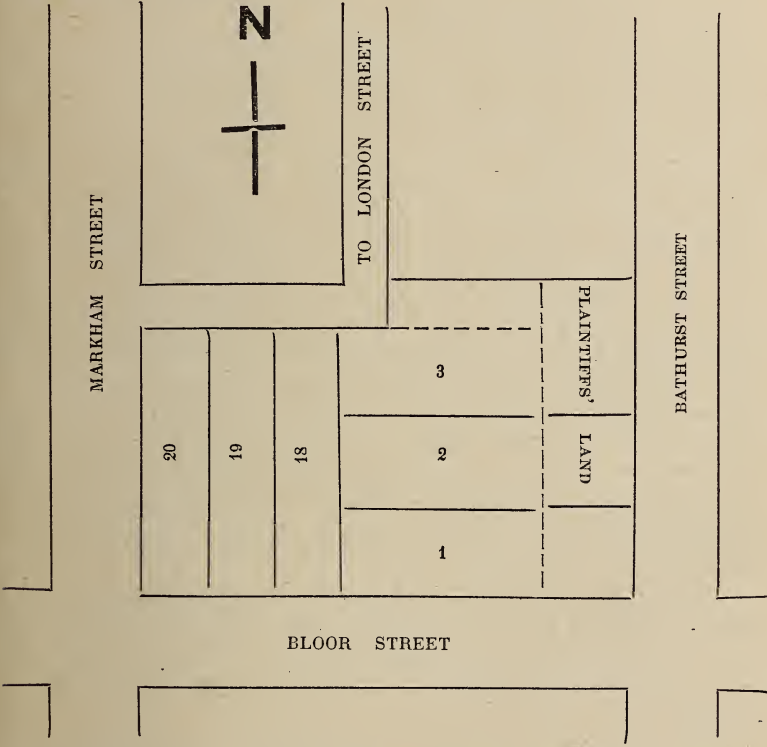
The action was tried by ROSE, J., without a jury, at a Toronto sittings.

R. U. McPherson, for the plaintiffs.

R. S. Robertson, for the defendant.

April 30, 1920. ROSE, J.:—The dominant tenement is a piece of land at the north-west corner of Bloor and Bathurst streets in Toronto, 50 feet in width measured along Bloor street and 150 feet in depth measured along Bathurst street. John Albert Devaney bought it in 1891 from the owners of lots 1, 2, and 3, according to registered plan No. 219, a copy of a portion of which is set out below; and he bought with it “a right of way at all times and for all purposes in, over, and upon the northerly 20 feet of lot number 3,” extending from the westerly limit of the land conveyed to him westerly to the lane shewn on the registered plan. On the copy of a portion of the plan I have indicated by broken lines the westerly limit of the land conveyed to Devaney, and the southerly portion of the land over which he was granted a right of way:—

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At a later time, the public lane running east and west shewn on plan 129 was closed, and there was substituted for it a lane a little farther north, and at the same time the southerly portion of the lane running north to London street was widened from 15 feet to 25 feet as shewn in the sketch on the next page:—

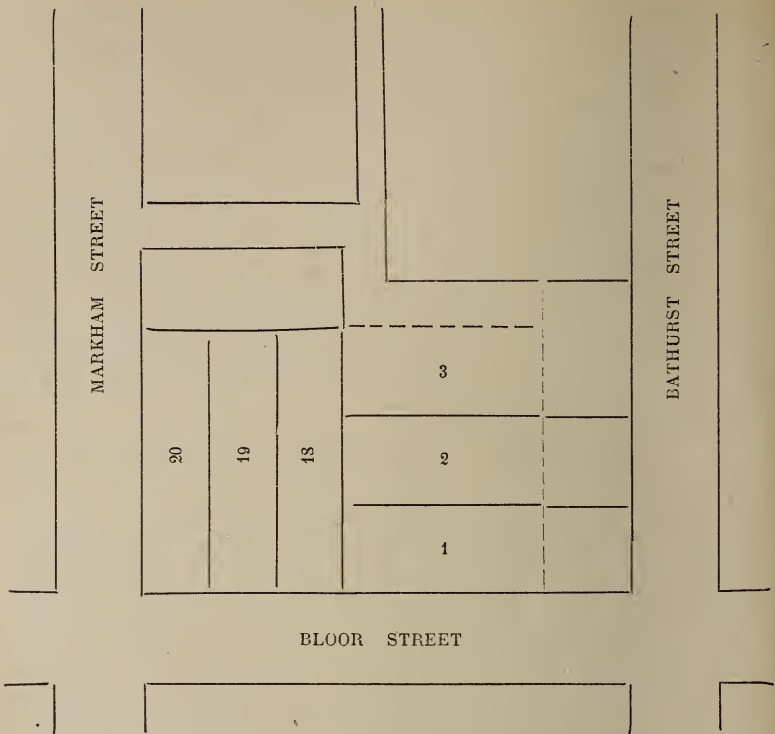
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In Devaney's lifetime, the building at the corner of Bloor and Bathurst streets was used as an hotel. It extended northerly from Bloor street not more than 100 feet; north of it, and fronting on Bathurst street, was a frame stable or barn used in connection with the hotel; and the principal purpose in securing the right of way or in stipulating for a right of way 20 feet wide was to insure an access to this stable for loads of hay, etc., coming down the public lane from London street or from Markham street.

John Albert Devaney died in 1906. After his death, Mrs. Devaney carried on the hotel business for a time, but finally the hotel was given up, and the ground-floor of the hotel building is now occupied by a chemist, the upper floors being let to various tenants.

Some years ago, the executors deemed it wise to pull down the barn and erect on the portion of their land lying north of what was formerly the hotel building three shops, with apartments over them, fronting on Bathurst street. These cover not only the space formerly occupied by the barn but also a vacant space that there was to the north of the barn. At the rear of

them is a concrete platform, and west of that is a pathway 5 feet in width, which the executors bought from the owners of the land lying to the west of the dominant tenement, as a passageway for the use of the tenants of their Bloor street premises, in bringing goods in from the lane over the right of way.

The defendant has recently purchased the westerly 50 feet of lots 1, 2, and 3, and has erected a brick theatre fronting on Bloor street. The northern wall of this theatre coincides with the southern limits of the public lane and of the westerly part of the land over which the plaintiffs have their right of way. On this northern wall the defendant has put two iron fire-escapes, one, which is not here in question, overhanging the public lane, and the other, which forms the subject of dispute in this action, overhanging the land over which the right of way exists. This fire-escape projects some 3 feet $4\frac{1}{2}$ inches from the wall. The platform itself is 7 feet from the ground, but it is supported by struts, which at their lower end where they join the wall are only some 5 feet above the ground. From the platform to the ground is an iron ladder, which is about one foot north of the wall.

The right of way is now used by the plaintiffs in bringing in fuel for the heating of the apartments over the Bathurst street shops, and it is used by the tenants of the Bathurst street apartments in bringing in their furniture. It is also used to some extent by the tenants of the plaintiffs' Bloor street shops and apartments. It is not suggested that any one using it has heretofore been put to the least inconvenience by the presence of the fire-escape: waggons coming in from the lane seem to proceed along the middle of the strip of land over which there is the right of way, and, so proceeding, there is not the least chance of coming in contact with the fire-escape. The plaintiffs, however, suggest that in the future there may be difficulty. Mrs. Devaney owns in her own right the 50 feet of lots 1, 2, and 3, lying between the executors' 50 feet and the defendant's 50 feet. The building on her property fronts on Bloor street and is a shallow building. The northern part of her land is not built upon, and there is no fence along the south limit of so much of her land as is subject to the plaintiffs' easement. The result is that vehicles which come through the lane and along the right of way are generally turned on Mrs. Devaney's property and are then backed against the platform at the rear of the Bathurst street buildings, and are then in a position to regain the lane on their outward journey without making any further turn; and what is suggested is, that if and when Mrs. Devaney builds on her land, and so blocks the land which is at present used as a

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turning ground, vehicles will have to turn in the public lane and back along the right of way strip on their inward journey, and it is suggested that, backing along the right of way strip, they may not steer as straight a course as they do at present, and may scrape along the fire-escape, which is at a height less than the height of the top of a high van. It is also suggested that, if two very large vans were to try to pass each other immediately north of the fire-escape, there might be difficulty; and, finally, the plaintiffs say that they may some day decide to tear down the northerly one of their Bathurst street buildings, and open a way through from Bathurst street, so as to make a continuous passageway from Markham street or London street by way of the lane, the right of way strip, and the new passageway to Bathurst street; and they say that, while they have not been hurt as yet, they desire to protect themselves against the possibility of interference in the future with their full enjoyment of the right of way. Perhaps I ought to have noted in passing that at one time while Mrs. Devaney was carrying on the hotel business she had gates across the westerly end of the strip of land over which the right of way exists. These gates were on posts which projected some distance into the 20 feet, and therefore considerably reduced the actual width of the way; and yet no one suggests that they caused any inconvenience.

The suggestions of future inconvenience seem to me to be far-fetched. They are not like the suggestions which Stirling, J., had to consider in *Sketchley v. Berger* (1893), 59 L.T.R. 754, and which led him to conclude that there was a substantial interference with the plaintiff's easement. On the contrary—the rule being as stated by Stirling, J., “that there is a difference between a grant of a way over a defined portion of land and a grant of the soil itself. In the latter case any interference with the soil gives rise to an action for trespass; in the former an action does not lie unless there is a substantial interference with the easement granted”—I have reached the conclusion that the action does not lie in this case. I think there is no interference with the easement granted, or, to use the language of Cockburn, C.J., in *Hutton v. Hamboro* (1860), 2 F. & F. 218: “practically and substantially the right of way can be exercised as conveniently as before,” and the plaintiffs have lost nothing by the alteration made by the defendant.

Obviously it is not a case for damages, because the plaintiffs have not suffered any loss; and it is not a case for an injunction, because it is, to say the least of it, highly improbable that they ever will be inconvenienced in the slightest degree by the fire-escape. They say they ought to have an injunction because it is

possible that, in some one of the ways which I have mentioned or in some other way, they may in the future suffer some inconvenience, and that when the inconvenience does arise they may be held to have lost by acquiescence their right to object. It seems to me, however, that, the plaintiffs having brought this action, there is not the slightest danger of its being held that they have acquiesced in any interference with the right of way, unless and until, the fire-escape proving to be an interference, they desist from objecting. An injunction which will harm the defendant ought not to be granted for the sake merely of protecting the plaintiffs against some future interference with the exercise of their right of way, which they apprehend but which it is difficult to believe will ever take place.

The action must be dismissed with costs.

The plaintiffs appealed from the judgment of ROSE, J.

September 20, 1921. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

R. U. McPherson, K.C., for the appellants. They are entitled to a right of way over the whole width of the land; a right not limited to the use of the surface, but including also the space over the lane: see *Knox v. Sansom* (1877), 25 W.R. 864. The contention of the defendant that the Court could act only after the appellants had suffered serious inconvenience, and that it could not take into consideration future probabilities, is not the law. There is a series of cases about easements in regard to light, the principle of which is applicable to this case: *Yates v. Jack* (1866), L.R. 1 Ch. 295, at p. 298, *per* Lord Cranworth, L. C.; *Aynesley v. Glover* (1874), L.R. 18 Eq. 544, *per* Jessel, M.R. The case of *Thde v. Starr* (1910), 21 O.L.R. 407, must be distinguished as dealing only with the effect of 10 years' possession, and because the right of way in question was over a lane laid out on a registered plan. A right of way may be lost if there is any abandonment or even acquiescence by one party in what the other has done: see *Bower v. Hill* (1835), 1 Bing. N.C. 549, at p. 555; *Mykel v. Doyle* (1880), 45 U.C.R. 65; *Bell v. Golding* (1896), 23 A.R. 485. Reference was made also to the Limitations Act, R.S.O. 1914, ch. 75, sec. 35.

R. S. Robertson, K.C., for the defendant, respondent. There has been no substantial interference with the appellants' right of way, and its character as a way has not been destroyed by the erection of a fire-escape: *Clifford v. Hoare* (1874), L.R. 9 C.P. 362. In no way do we challenge or interfere with the appellants'

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enjoyment of their right of way, and so the cases cited by counsel for the appellants are distinguishable upon the facts. In *Bell v. Golding, supra*, the act in question was, so far as it extended, destructive of the easement.

McPherson, in reply, referred briefly to the evidence.

October 7. MIDDLETON, J.:—The facts in this case are simple. The plaintiffs are the owners of a piece of land on the north side of Bloor street at the corner of Bathurst street, having a frontage on Bloor street of 50 feet, and a depth on Bathurst street of 150 feet. Towards the north their property has a width of 65 feet as against 50 feet frontage. The plaintiffs have also by grant a right of way “at all times and for all purposes in common with all other persons entitled thereto in over and upon the northerly 20 feet” of lot number 3. This 20-foot strip extends westerly from the plaintiffs’ property to a public lane running north and south.

The defendant owns 50 feet of land fronting on Bloor street and extending northerly to this lane. Upon this he erected a motion picture theatre, covering the entire lot. He also erected a fire-escape projecting over the right of way 3 feet 4½ inches, and a ladder projecting about a foot. This fire-escape is 7 feet 6 inches above the surface of the ground, but it is supported on iron brackets sloping from the outer edge to the wall of the building.

The plaintiffs’ action is for a declaration that this is an obstruction of their right of way, and for an order for its removal.

The learned trial Judge has taken the view that this is not such a substantial interference with the plaintiffs’ right of way as to justify the granting of any relief, and has dismissed the action with costs.

There is no question as to the existence and extent of the plaintiffs’ right. The defendant claims title under the plaintiffs’ grantor by a junior conveyance.

At the time of the bringing of this action, and up to the trial, it was not shewn that the structure complained of actually caused any inconvenience to the plaintiffs, as the unobstructed portion of the 20 feet was sufficient to meet their requirements.

I am unable to agree with the view taken by the learned trial Judge. It is well settled that the rights of the parties must be determined according to the true construction of the grant (see *United Land Co. v. Great Eastern R.W. Co.* (1875), L.R. 10 Ch. 586); and it is to be observed that the grant here is in the widest possible terms. It follows, I think, that the grantor must

not derogate in any way from his grant. Where the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears to me to be almost impossible to say that there is not a real and substantial interference with the right conveyed.

I quite agree with the opinion expressed in several cases that the Court is not called upon to interfere where that which is done is some small and insubstantial thing which does not in truth and in substance affect the beneficial use of the right granted; but, where the plaintiff's right depends upon the terms of a written grant, it ought not to be easy for the grantor to cut down the full extent of the privilege which for valuable consideration he has conveyed.

In each case it appears to me that it must be regarded as a question of fact, and upon the undisputed state of affairs here I can come to no other conclusion than that this structure is a substantial interference with the plaintiffs' right. I rely on *Sketchley v. Berger*, 59 L.T.R. 754; *Clifford v. Hoare*, L.R. 9 C.P. 362.

I am also of opinion that, where the structure complained of is permanent in its nature, there is a real danger that the plaintiff, if he does not assert his rights, and acquiesces in its continuance, may be taken to have abandoned his right to complain, and to have so acquiesced in the thing complained of as to prevent him from hereafter asserting his rights. It is not necessary to enter upon a discussion of this question at length, for in my view the plaintiffs' right is clear.

The judgment should be so framed as to give the defendant 3 months in which to remove that which is complained of.

RIDDELL, J., agreed with MIDDLETON, J.

LENNOX, J.:—I agree in the reasoning and conclusions of my brother Middleton.

MEREDITH, C.J.C.P.:—The right which the plaintiffs have is only a right of way; in all other respect the land is, as between the parties to this action, owned by the defendant, who has all other rights of ownership in and over it, including a way into the rest of his land adjoining it.

But the right which the plaintiffs have is a right of way over the strip of land 20 feet in width; not a right of way over a strip 16 or 17 in width; so that if the effect of that which is com-

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plained of is to reduce the right of way in width 3 or 4 feet, so that it is made one over a strip of land not 20 feet but only 16 or 17 in width, the plaintiffs ought to have a good cause of action, whether 16 or 17 feet, or none at all, is sufficient for their present uses, or is not; and it is admitted that, if that be so—if the right is so reduced—the plaintiffs have a good cause of action.

It has been proved, and indeed is self-evident, that for all conveyances, or loads, over 7 ft. 6 in. in height, the 20-foot right of way is permanently reduced by the width of the “fire-escape” platform complained of, that is, 3 ft. 4½ in.; just as effectually, and more harmfully, reduced as and than if the space covered by the platform were built upon with bricks and mortar from the ground up to the roof of the building to which the fire-escape is attached: and accordingly the plaintiffs have a good cause of action.

But, if that were not so, if the question were merely whether the plaintiffs’ right of access to their land over the land in question is substantially obstructed by the structure in question, regardless of any specified width of the land over which the way existed, it could not, in my judgment, be well found that it is not.

The way into this way is also narrow, and the turn into it, at right angles, is more or less difficult according to size and character of the vehicle being driven; quite difficult enough at the full width of 20 feet with a large horse-drawn furniture-van, for instance; and still more difficult when more than one conveyance is at the turn, or in the short way, at the one time: and there must be always some danger in driving in or out in the dark—danger of the top of the conveyance or load striking against the projecting platform or its bracket supports.

And there is no reason, or excuse, that I can imagine, why any danger, or inconvenience, or narrowing of the way, should exist: the platform could, no doubt, be placed a little higher and be supported, if need be, from above instead of from below; or, if that should be inconvenient, it could, quite as well, be supported from above and made to fold up against the building when not in use.

It is not a sufficient answer, to such an action as this, merely to say that the plaintiff has had no need to exercise his right, or has hitherto suffered no injury or inconvenience in exercising it; it is his right to exercise it fully whenever he sees fit and to have any obstruction to such a reasonable exercise of it removed: he is not bound to submit to it and actually suffer from it before the defendant can be compelled to remove it.

I am in favour of allowing the appeal, and of compelling the defendant to abate the obstruction, in any way that he may see fit; and of allowing him 3 calendar months' time in which to do so effectually. The appellants to have their costs throughout.

LATCHFORD, J.:—I think this appeal should be allowed. The case relied on by the defendant, *Clifford v. Hoare*, L.R. 9 C.P. 362, decided on a special case, appears to state the law applicable to an infringement of a right of way, but the facts of the present case are materially different.

There the action was for breach by a grantor of a covenant that he had not been a party or privy to anything whereby a right of way conveyed to the plaintiff over a road to be constructed of a width of not less than 40 feet should be impeached, charged, or incumbered in title, estate, or otherwise. He had previously joined in a conveyance of adjacent lands, authorising the grantee to erect a portico over the footpath forming a part of the right of way, provided the designs were submitted to and approved by the grantors or one of them. The designs were so submitted and approved. The portico, which projected from the first floor at a height of 16 feet from the ground, was supported by pillars which extended 2 feet into the right of way and along it for a distance of 5 feet. The material point considered was, whether there had been an interference with the right of way granted to the plaintiff. If this was decided adversely to the defendant, he would have been held liable upon his covenant. Coleridge, C.J., said (p. 370) that, construing the deeds according to the intention of the parties as expressed therein, the Court gathered from the language of the deed to the plaintiff that the intention was to grant to him as an easement the reasonable use and enjoyment of a right of way, and that it was not suggested that the plaintiff had not such reasonable use and enjoyment. "Upon the statements in the special case, it does not appear that the plaintiff has not got in the fullest sense that which the deed purported to convey to him. If so, it follows that this action . . . cannot be sustained." Brett, J., considered that there had been no substantial interference with the plaintiff's reasonable use of the easement granted to him, and said (p. 371) that the plaintiff's rights had not been infringed at all, adding (pp. 371, 372): "I would wish to guard myself from being understood to say that we should be justified in disregarding an interference with a right because the damage is inappreciable. Generally speaking, any interference with a *right*, however small, creates a cause of action."

While any appreciable obstruction of a highway is action-

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able, the obstruction of a private right of way is, upon later authority, not actionable unless there is a real, substantial interference with the enjoyment of it—*per* Cozens-Hardy, M.R., in *Pettey v. Parsons*, [1914] 2 Ch. 653, 662.

In the present case there is a real and very substantial interference with the plaintiffs' enjoyment of the narrow right of way—far more real and substantial than in the English cases cited. That is why I think the appeal should be allowed. A reasonable time should be given to the defendant to remove the obstructions.

Appeal allowed.

[IN BANKRUPTCY.]

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Oct. 7.

RE LINDNERS LIMITED.

Bankruptcy—Scheme of Arrangement—Provision for Payment of Unsecured Creditors—Allotment and Issue of Shares in Company.

The Court refused to approve of a scheme of arrangement proposed by the insolvent debtor, an incorporated company, and accepted by a majority of its creditors, whereby the preferred and secured creditors were to be paid by the debtor and the unsecured creditors paid in full by the allotment and issue to them of fully paid-up preference shares in the debtor company or in a new company to be incorporated. The scheme was not one which should be forced upon an unwilling creditor.

MOTION by an authorised trustee for an order, under sec. 13 of the Bankruptcy Act, approving a scheme of arrangement.

September 16. The motion was heard by ORDE, J., in Chambers.

H. H. Davis, for the trustee and for Lindners Limited, the debtor company.

J. M. Bullen, for the Bowes Company Limited, a dissenting creditor.

I. F. Hellmuth, K.C., for the Union Bank of Canada, a secured creditor.

October 7. ORDE, J.:—The scheme of arrangement proposed by the insolvent company, in its modified form, as accepted by the majority of the creditors, is, shortly, that all the preferred and secured claims shall be duly paid by the debtor, and that the unsecured creditors shall be paid in full by the allotment and

issue to them of fully paid-up preference shares either in the present debtor company or in a new company to be incorporated and organised to take over the business of the present company. Such preferred shareholders are to be entitled to elect four out of the five directors constituting the board.

The proposal was accepted by a majority of the creditors, but was opposed by certain creditors, among them the Bowes Company Limited.

The trustee reports in favour of the scheme; and the sole question to be determined is, whether or not the scheme is one which ought to be forced upon an unwilling creditor.

While the proposed scheme of arrangement may possibly result in the ultimate recovery by the unsecured creditors of a greater sum than they would realise if the assets of the company are disposed of immediately, such a result is wholly speculative, and it is fundamentally a startling proposition that an unwilling creditor should be forced to forgo his debt and accept in lieu thereof shares of his debtor's capital stock. If it were possible to accomplish such a result, one would have supposed that there would be numerous precedents under the corresponding provisions of the English Act which would furnish some guide as to the principles to be applied in approving or disapproving of such a proposal. But there was not cited, nor have I found, any case in which such a proposal has been dealt with; so that my only conclusion is that no such drastic course of action was ever contemplated by the Act.

Several cases were referred to on the argument, all tending to shew that the Court will not approve of any scheme if it does not provide more for the creditors than would be realised by a winding-up of the estate of the insolvent debtor. It is argued here that a winding-up will realise absolutely nothing for the unsecured creditors. If that is true, then, on the face of it, giving them stock, even preferred stock, in the debtor company, gives them something of absolutely no value. Its value is merely speculative and problematical.

I do not think that in permitting an insolvent debtor to obtain a discharge, because that is what it means, by submitting and obtaining the approval of "a scheme of arrangement of his affairs," it was intended that any such scheme should not only arrange the affairs of the debtor, but should so arrange the affairs of the creditor as to wipe out his claim by absorbing him against his will into the debtor's business. The scheme of arrangement must, as in the case of a composition or an extension, have for its object the satisfaction of the debts by means of payment in cash either immediately or at some future date. The only means

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whereby the creditor who takes shares in the debtor company could be paid cash would be by a sale of the shares or by waiting for a distribution upon the winding-up of the debtor company. It may be impossible to sell the shares and the company may never be wound-up. The creditor consequently finds himself with a valueless security. He has in fact ceased to be a creditor altogether and has in a sense become associated with the business and affairs of the debtor. In my judgment, no such scheme was intended by the Act to be forced upon an unwilling creditor.

For these reasons, I must refuse to approve of the proposed scheme of arrangement.

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Oct. 15.

[IN BANKRUPTCY.]

RE GUMP.

Bankruptcy—Fees and Costs of Interim Receiver—Priority of Payment—Inadequacy of Assets to Pay all Fees and Expenses—Position of Trustee—Mismanagement of Estate—Status of Interim Receiver to Complain—Neglect of Trustee to Obtain Indemnity from Creditors—Bankruptcy Act, secs. 4 (6), 5, 15 (5), 27 (b).

Pending the hearing of a petition in bankruptcy, T., an authorised trustee, was appointed interim receiver of the property of the debtor, under sec. 5 of the Bankruptcy Act. Before the hearing of the petition, the debtor made a voluntary assignment under the Act to M., also an authorised trustee. At a meeting of the creditors, a resolution was passed in favour of the winding-up of the estate under the voluntary assignment, and M. was confirmed as trustee. Under the authority of sec. 4 (6), an order was made by the Judge in Bankruptcy dismissing the petition, allowing the winding-up to proceed under the voluntary assignment, and directing (*inter alia*) that the fees of T. as interim receiver should be paid by M. as trustee, out of the assets of the estate, as fees and expenses of the administration, in priority to debts. It was not then contemplated that the assets might prove insufficient for the payment of all the fees and expenses, but that turned out to be the case:—

Held, that T.'s fees and expenses were a first charge upon the assets, and should be paid in priority to other fees and expenses, in the administration thereof.

Ex p. Browne (1881), 29 W.R. 921, distinguished.

In a case where there is any doubt as to the value of the estate, an authorised trustee should, before proceeding with its administration, obtain an indemnity from the creditors under secs. 15 (5) and 27 (b) of the Bankruptcy Act.

No one except the creditors can attack the trustee upon the ground that he has mismanaged the estate.

Ex p. Browne, supra, followed upon this point.

APPLICATION by Richard Tew, an authorised trustee under the Bankruptcy Act, for an order directing N. L. Martin, also

an authorised trustee, to pay the applicant's costs and other expenses in connection with his appointment as interim receiver of the property of Craig J. Gump, an insolvent debtor, under sec. 5 of the Act.

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October 7. The application was heard by ORDE, J., in Chambers.

A. L. Fleming, for Richard Tew.

G. N. Shaver, for N. L. Martin.

October 15. ORDE, J.:—This is a case which, like that of *Re Auto Experts Limited* (1921), 49 O.L.R. 256, shews how important it is for authorised trustees to obtain an indemnity from the creditors under secs. 15 (5) and 27 (b) of the Bankruptcy Act, in all cases where there is any doubt as to the value of the estate, before proceeding with its administration.

In the present case, one of the creditors of Craig J. Gump, who was carrying on the business of the Arlington Hotel, filed a petition in bankruptcy; and, pending the hearing of the application, Richard Tew, an authorised trustee, was appointed interim receiver of the property, under sec. 5.

Before the hearing of the petition, the insolvent made a voluntary assignment under the Act to N. L. Martin, an authorised trustee. At a meeting of the creditors, a resolution was passed in favour of the winding-up of the estate under the voluntary assignment, rather than by way of a receiving order, and Martin was confirmed as trustee.

Acting under the authority given by sub-sec. 6 of sec. 4, I dismissed the petition for a receiving order, and allowed the winding-up to proceed under the voluntary assignment, and I also ordered that out of the assets of the estate which should come to the hands of the authorised trustee, N. L. Martin, he should pay to the petitioner its costs of the petition and of certain orders which had already been made, and of the appeal therefrom, and also that the fees of the interim receiver should be paid by Martin as trustee, out of the assets of the estate, as fees and expenses of the administration, in priority to debts.

The order was silent as to any priority in the payment of the interim receiver's fees and costs, but this was wholly due to the fact that it was not in the contemplation of any one at that time that the assets might prove insufficient for the payment of all the fees and expenses.

Under the direction of the inspectors of the estate, Martin, as trustee, carried on the business of the hotel for some time. Owing to the claim of the landlord, the continuation of the busi-

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ness ultimately resulted in the failure to realise sufficient out of the assets to pay all the costs and expenses of administration.

Tew now applies for an order directing Martin to pay his costs and other expenses. Martin resists this, on the ground that he is already out of pocket, and should not be called upon to pay anything more, and his counsel relies upon *Ex p. Browne* (1881), 29 W.R. 921.

In that case it was held that the receiver who had been appointed to take possession of the debtor's property, but who had afterwards handed over the property to the trustee in the bankruptcy, had no lien for his costs and expenses. The application was based upon the contention that the trustee had mismanaged the estate, and the Court held that no one could attack the trustee upon any such ground except the creditors.

It was suggested here that Martin had mismanaged the estate; but, without having examined the case above mentioned, I refused to listen to any such argument from counsel on behalf of the interim receiver, for the very same reason as that laid down in the case of *Ex p. Browne*.

I cannot, however, look upon the case of *Ex p. Browne* as having any other application to the circumstances of the present case. Here Tew, as interim receiver, takes over the property and incurs expense, all in good faith. Through no fault of his own, but merely because of the wishes of the creditors, the administration is handed over to Martin. Had it been contemplated at that time that there was any possibility of a deficiency of assets, I should certainly have made it a condition of my order that Tew's fees and expenses should have priority over all other expenses in the administration. Tew had it in his power, had he continued the administration, to protect himself by getting an indemnity from the creditors. Martin had it in his power to protect himself by doing so, and he knew that some expenses had already been incurred. It would be a deplorable thing if, under such circumstances, a trustee should be permitted to consider that the costs already incurred by his predecessor in the trust should be paid last.

Unless it could have been shewn that the gross amount realised out of the assets was insufficient to pay Tew, then I am of the opinion that Tew's fees and expenses constitute in effect a first charge upon the assets, in priority to other fees and expenses in the administration thereof.

I must accordingly order that Martin shall forthwith pay the fees, costs, and expenses to which Tew and the petitioning creditor are entitled under the terms of my order of the 18th February last. So far as the costs of this application are concerned, I think justice will be served by making no order as to them.

[IN CHAMBERS.]

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Oct. 18.

Ontario Temperance Act—Magistrates' Conviction for Offence against—Motion to Quash—Remedy by Appeal—Sec. 92 (1) (11 Geo. V. ch. 73, sec. 6)—Remedy by Certiorari Superseded—Summary Convictions Act, sec. 10 (3)—Construction of—Extraordinary Supervisory Jurisdiction of Superior Court.

Since the amendment of the Ontario Temperance Act in 1921 by 11 Geo. V. ch. 73, sec. 6, by which secs. 92, 93, 94, and 95 are repealed and new sections (providing for an appeal) substituted, a proceeding in the nature of a *certiorari*, for the purpose of quashing a summary conviction for an offence against the Act, does not lie.

Sub-section 3 of sec. 10 of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, is not confined to cases in which the right to appeal is conferred by sub-sec. 1: the words "such conviction" in sub-sec. 3 refer to any conviction made under and by virtue of any Act of the Province.

Whether or not that is the true construction of sub-sec. 3, the extraordinary supervisory jurisdiction of the superior court over the process of the inferior courts ought not to be exercised where another remedy is open to the applicant.

MOTION by the defendant for an order quashing a conviction made by two Justices of the Peace for an offence against sec. 41 of the Ontario Temperance Act.

October 14. The motion was heard by MIDDLETON, J., in Chambers.

James Haverson, K.C., for the defendant.

F. P. Brennan, for the magistrates, objected that the motion could not be entertained, because by an Act of 1921, amending the Ontario Temperance Act, an appeal now lies from a conviction made under that Act.

The amending Act is 11 Geo. V. ch. 73, by sec. 6 of which secs. 92, 93, 94, and 95 of the Ontario Temperance Act, as previously amended, are repealed and new sections are substituted therefor. The new section 92 (1) is as follows:—

"Any person convicted under this Act may, subject to the provisions hereinafter mentioned, appeal from the conviction to the Judge of the County or District Court of the county or district in which the conviction or order is made, sitting in Chambers without a jury, if a notice of such appeal is given to the prosecutor or complainant and to the convicting magistrate within 10 days of such conviction."

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a conviction made by two Justices of the Peace on the 29th August, 1921, whereby the applicant was convicted of a breach of sec. 41 of the Ontario Temperance Act in having liquor, on the 29th July, 1921, in a place other than a private dwelling.

A preliminary objection was taken by Mr. Brennan, and this alone was argued.

It is contended that, since the passing of the amendment to the Ontario Temperance Act in 1921, 11 Geo. V. ch. 73, sec. 6, providing for an appeal from a conviction under the Act to the Judge of the County Court, *certiorari* will not lie.

The Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10, sub-sec. 3, provides:—

“No such order or conviction shall be removed into the Supreme Court by writ of *certiorari* or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy.”

If this section applies to the conviction in question, Mr. Haverson admits that the objection is well-taken. He argues that the opening words, “No such order or conviction,” indicate that the provision is only applicable to cases falling within the first two sub-sections of the section in question.

I think that this contention is not well-founded. Sub-section 1 provides that, where there is no other provision in the Act under which the conviction takes place, an appeal shall lie to the General Sessions of the Peace in certain cases and in other cases to the Division Court. Sub-section 2 provides that where by any statute an appeal is given to the Judge of the County or District Court from a summary conviction, and no special provision is made, the appeal shall be to the Division Court. I do not think that it necessarily follows that sub-sec. 3 is confined to cases in which the right to appeal is conferred by the first sub-section, for sub-sec. 3 speaks not only of the appeal provided by the Summary Convictions Act, but also of the appeal provided by “any Act” under which the conviction takes place, and I would read the words “such conviction” as referring to any conviction made under and by virtue of any Act of the Province. Sub-section 2 appears to me to be colourless so far as this question is concerned, for it merely points out the proper forum where the right of appeal is given in a certain way. This view has been accepted in all the earlier cases. See *Rex v. Warne Drug Co. Limited* (1917), 40 O.L.R. 469, at p. 474, where they are collected.

Even if I should be wrong in thinking that this is the true construction of the statute, I should still hold the objection to be well-taken, for it is fundamental law that the extraordinary

supervisory jurisdiction of the superior court over the process of the inferior courts ought not to be exercised where another remedy is open to the applicant. The *certiorari* is for the purpose of enabling more sure and certain justice to be done in the premises, and this end can be best attained by following the channel indicated by the Legislature and in taking the appeal which has been provided.

Speaking generally, the right of appeal is a far more satisfactory remedy than *certiorari*. Upon *certiorari* the Court can only determine whether there is any view of the evidence which would justify the conviction. Upon an appeal the Court has the right to weigh the evidence and to interfere where the conviction is against the weight of evidence. I am satisfied that in the past many a conviction has been maintained where it has in truth proceeded upon some erroneous view of the law entertained on the part of the magistrate, but the Court has been powerless to relieve because upon some possible view a conviction might properly be made.

The motion will, therefore, be refused; but, as this is the first case under the new statute, I do not award costs.

[MIDDLETON, J.]

RE REYNOLDS AND HARRISON.

Executors—Will—Direction to Pay Debts—Debt-charge on Lands of Testator—Trustee Act, sec. 47—Application to Implied Charge—Power to Sell and Convey—Exercise of.

Section 47 of the Trustee Act applies, not only where a charge is express, but where it is implied or arises by the operation of law.

A direction to pay debts constitutes a debt-charge upon the lands of a testator; by virtue of sec. 47 the executors have power to sell the lands; and the purchaser is not bound to inquire whether the power has been duly and correctly exercised by the executors.

MOTION by the executors of Rhoda Reynolds, deceased, the vendors, for an order, under the Vendors and Purchasers Act, declaring that the applicants were able to make a good title to lands of the deceased which they had agreed to sell to Harrison, the purchaser.

October 13. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

H. W. Mickle, for the applicants.

O. R. Macklem, for the purchaser.

F. W. Harcourt, K.C., Official Guardian, for the infants concerned.

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October 18. MIDDLETON, J.:—The question raised is as to the power of the executors to sell the lands of the testatrix.

By will Rhoda Reynolds, who died on the 23rd March, 1920, after appointing her executors, directed that her debts and funeral and testamentary expenses be paid, and she then bequeathed to her executors certain personalty to be held upon trust, and, after giving certain legacies, she devised and bequeathed to her executors certain property in trust for her daughter, Bessie Reynolds East, and her issue, and this was followed by a general clause appointing the executors trustees, and giving to them, and their survivor, all powers and authority given or allowed by law. The executors are now selling part of the real estate of the testatrix, and the purchaser questions their power to do so under the will.

The direction to pay the debts constitutes a debt-charge upon the lands of the testatrix: *Clifford v. Lewis* (1821), 6 Madd. 33; *Sissons v. Chichester-Constable*, [1916] 2 Ch. 75; *In re Bailey* (1879), 12 Ch. D. 268, 273; *In re Tanqueray-Williams and Landau* (1882), 20 Ch. D. 465; *Mercer v. Neff* (1898), 29 O.R. 680. It follows that, under our statute, the Trustee Act, R.S.O. 1914, ch. 121, sec. 47,* the executors have the power to sell and that

*47.—(1) Subject to the provisions of the Devolution of Estates Act where, by any will coming into operation after the 18th day of September, 1865, a testator charges his land, or any specific part thereof, with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the land so charged to a trustee for the whole of his estate or interest therein, and does not make any express provision for the raising of such debt, legacy or sum of money out of such land, the devisee in trust, notwithstanding any trusts actually declared by the testator, may raise such debt, legacy or money by a sale and absolute disposition, by public auction or private contract, of such land or any part thereof, or by a mortgage of the same, or partly by one mode and partly by the other, and in any mortgage so executed may agree to such rate of interest and such period of repayment as he may think proper.

(2) The powers conferred by this section shall extend to every person in whom the land devised is for the time being vested by survivorship, descent or devise, and to any person appointed under any power in the will or by the Supreme Court to succeed to the trusteeship vested in such devisee in trust.

(3) If a testator who creates such a charge does not devise the land so charged in such terms that his whole estate and interest therein become vested in a trustee the executor for the time being named in the will, if any, shall have the like power of raising money as is hereinbefore conferred upon the devisee in trust; and such power shall from time to time devolve upon and become vested in the person in whom the executorship is for the time being vested.

(4) Any sale or mortgage under this section shall operate only on the estate and interest of the testator.

(5) Purchasers or mortgagees shall not be bound to inquire whether

the purchaser is not bound to inquire whether the power has been duly and correctly exercised by the executors.

The only question which calls for discussion is whether the section applies unless there is an express charge of the debts upon the land. The uniform holding in all the cases is that the statute applies, not only where a charge is express, but where it is implied or arises from the operation of the law.

The order will, therefore, declare that a good title can be given.

-----Y

[IN CHAMBERS.]

X
RE PHILLIPS AND LA PALOMA SWEETS LIMITED.

Company—Private Company—Seizure by Sheriff of Shares of Execution Debtor—Sale to Stranger—Application to have Transfer Recorded—Refusal by Directors—Motion for Mandatory Order—Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 2 (c) (i), 56 (1), 60—Execution Act, R.S.O. 1914, ch. 80, sec. 12 et seq.—“Transferable Shares”—Remedy of Execution Creditor—Receiving Order.

A provision in the charter of a company incorporated under the Ontario Companies Act, R.S.O. 1914, ch. 178, that “the shares of the company shall not be transferred without the consent of the board of directors,” is valid: secs. 2 (c) (i) and 56 (1).

A sheriff’s sale can give to the purchaser only the right and title of the debtor.

If the directors’ consent to a transfer is necessary, and in giving or refusing their consent they act *bonâ fide* with a view to protecting the interests of the company, the exercise of their discretion will not be interfered with; the onus of proving that they have acted improperly is on the person complaining of their conduct.

Section 12 of the Execution Act, R.S.O. 1914, ch. 80, provides for the seizure and sale of “transferable shares” only, and that does not include shares which cannot be transferred without the consent of the directors.

The provision found in sec. 60 of the Companies Act must be regarded as subordinate to the wider provision in sec. 56 (1), and not as in conflict with the provisions of that section giving power to restrict the right of transfer.

A purchaser at a sheriff’s sale under execution of shares of a company, in such circumstances as above described, was refused a mandatory order directing the proper officers of the company to record the transfer to him.

Semble, that the execution creditor was not without remedy, for a receiver might be appointed to receive all dividends payable.

the powers conferred by this section, or any of them, have been duly and correctly exercised by the person acting in virtue thereof.

(6) This section shall not extend to a devise to any person in fee or in tail, or for the testator’s whole estate and interest charged with debts or legacies, or affect the power of any such devisee to sell or mortgage.

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MOTION by one Phillips for a mandatory order directing the proper officers of La Paloma Sweets Limited, an incorporated company, to record a transfer of shares of the company's stock and to issue a proper share-certificate to the applicant.

October 14. The motion was heard by MIDDLETON, J., in Chambers.

G. Hamilton, for the applicant.

H. T. Beck, for the company.

October 20. MIDDLETON, J.:—By letters patent issued on the 26th July, 1917, Bistrey's Limited was incorporated pursuant to the provisions of the Ontario Companies Act, the letters of incorporation containing the provision that the company shall be a private company, and the following provisions shall apply thereto: "(1) The shares of the company shall not be transferred without the consent of the board of directors." The number of shareholders is limited to 50, and any invitation to the public to subscribe for shares, debentures or debenture stock, is prohibited.

On the 25th June, 1918, the name of the company was changed to La Paloma Sweets Limited. The capital stock of the company consisted of 4,000 shares of \$10 each. According to the certificate produced, 1,103 shares have been issued, of which one Ginoff appears to hold 100.

On the 1st June, 1921, an execution against Ginoff having been placed in the hands of the sheriff, the sheriff served a notice, based upon the writ of execution, seizing the shares standing in his name, and in due course, on the 27th June, this stock was sold to Phillips by the sheriff, Phillips having paid to the sheriff \$955 for the \$1,000 of stock. Phillips then requested that the transfer to him should be recorded, but this was refused by the company, upon the ground that, according to the terms of the charter, the stock could not be effectually transferred without the consent of the directors, and that the directors did not desire to admit Phillips as a shareholder. Phillips asserts that the stock is worth at least \$12 per share, or 20 per cent. above par, and expresses his readiness to transfer the stock to any nominee of the company or its directors at an advance upon its cost to him sufficient to compensate him for his trouble and expense with a reasonable profit.

What motive led to the purchase of the stock is not disclosed. Phillips is not an execution creditor, and does not appear to have been interested in the matter before he purchased the stock.

Under the statute (the Ontario Companies Act, R.S.O. 1914,

ch. 178) a "private company" is one in which, *inter alia*, "the right to transfer its shares is restricted," sec. 2 (c) (i); and by sec. 56 (1), shares are to be transferable "in such manner and subject to such conditions and restrictions as by this Act . . . (or) the letters patent . . . may be prescribed."

The provision in the charter is, therefore, valid.

It is elementary law that an execution creditor, apart from some statutory provision, has no greater right than the execution debtor, and that the sheriff's sale can only give to the purchaser the right and title of the debtor; so here the applicant has no greater or other right than the execution debtor unless he can point to some statute assisting him.

The case law is collected and discussed in Lindley on the Law of Companies, 6th ed., vol. 1, p. 647, and it is there stated as the result that when by the constitution of the company the consent of the directors is required, "the power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly, and not capriciously. At the same time, if their consent to a transfer is necessary, and, in giving or refusing their consent to a transfer, they act *bonâ fide*, with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with If the directors refuse their consent to a transfer they are not bound to state their reasons for refusal. . . . ; if their conduct is questioned the onus of proving that they have acted improperly is on the person complaining of their conduct."

In the case of a private company the situation is not essentially different from a partnership, and it is almost impossible to imagine any case in which the Court would interfere unless some flagrantly improper motive could be shewn, e.g., an attempt by the directors to force a sale to themselves at a gross undervaluation. No suggestion of *mala fides* is here made.

Reliance is placed upon the provisions of the Execution Act, R.S.O. 1914, ch. 80, sec. 12 * *et seq.* That statute provides only

*12. Shares and dividends, and any equitable or other right, property, interest or equity of redemption in or in respect of shares or dividends in an incorporated bank or an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property. (Sections 13 to 16 relate to the sheriff's procedure and the effect of a sale.)

† 60. No transfer of shares, unless made by sale under execution or under the order or judgment of a competent court, shall, until entry thereof has been duly made, be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, and, if absolute, as rendering the transferee and the transferor jointly and severally liable to the company and its creditors until entry thereof has been duly made in the books of the company.

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for the seizure and sale of "transferable shares." That, I think, does not include shares which can be transferred only with the consent of the directors, but applies only to shares which the debtor can freely transfer. The provision found in the Companies Act, sec. 60,† must be regarded as subordinate to the wider provision in sec. 56 (1), and cannot be intended to conflict with the power which it gives to restrict the right to transfer.

It is said that this will leave an execution creditor of a shareholder in such a company without remedy. I do not think that that is so, as a receiver may be appointed to receive all dividends payable. Apart from the statute, this was the only remedy of the creditor of one member of a partnership.

Motion dismissed with costs.

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GRAY V. QUINN.

Limitation of Actions—Period of Limitation—Criminal Conversation—Limitations Act, sec. 49 (1) (g), (h).

An action for criminal conversation is an action "upon the case" within the meaning of para. (g) of sec. 49 (1) of the Limitations Act, R.S.O. 1914, ch. 75, and the period of limitation is 6 years. The damages referred to in para. (h) are confined to damages "given by any statute."

MOTION by the defendant for a judgment dismissing the action, upon the ground set out below.

October 20. The motion was heard by MASTEN, J., in the Weekly Court, Toronto.

H. S. White, K.C., for the defendant.

E. G. Long, K.C., for the plaintiff.

October 21. MASTEN, J.:—This was a motion made on behalf of the defendant for judgment in favour of the defendant dismissing this action with costs, upon the ground that it appears from the admissions in the plaintiff's statement of claim and in the particulars thereof delivered and in the examination of the plaintiff for discovery, that the plaintiff's claim sought to be enforced in this action is barred by virtue of the Limitations Act, R.S.O. 1914, ch. 75, sec. 49.

The action is for criminal conversation. The writ of sum-

mons was issued in this action on the 4th April, 1921, and the plaintiff in his particulars supplementing his statement of claim sets up as the last act of adulterous intercourse the following: "On Friday April 12th, 1918, at 3 o'clock in the afternoon, at the defendant's premises at Myrtle, Ontario, and on other occasions of which the exact dates are at present unknown to the plaintiff."

The question at issue between the parties turns on the construction of sec. 49 (1) of the Limitations Act, R.S.O. 1914, ch. 75, and more particularly on paras. (g) and (h) of that subsection:—

"49.—(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned: . . .

"(g) An action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander; within six years after the cause of action arose;

"(h) An action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved; within two years after the cause of action arose."

The defendant contends that the plaintiff's claim is for damages within the meaning of para. (h) quoted, while the plaintiff's contention is that for the purpose of determining the question as to the applicability of the Statute of Limitations the action falls within para. (g) as an action upon the case, and that the period of limitation is 6 years and not 2.

The first point raised by the plaintiff in answer to the defendant's contention is that this is an action upon the case within para. (g) above quoted, citing *Bailey v. King* (1900), 27 A.R. 703, affirmed in *King v. Bailey* (1901), 31 Can. S.C.R. 338; and *Chamberlain v. Hazlewood* (1839), 5 M. & W. 515. These cases make it clear that an action of criminal conversation is an action on the case. Further reference may be had on the point to Stephen on Pleading, 6th ed. (1860), p. 17, and to Maitland's Equity and the Forms of Action (1909), p. 361.

The plaintiff not only contends that this action falls within para. (g) above quoted, but that in any case it does not fall within para. (h), citing *Maitland v. Mackenzie* (1912), 4 O.W.N. 109, 23 O.W.R. 80, and *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718. From these cases it seems to me to be plain that, upon the proper interpretation of para. (h), the damages there referred to are confined to damages "given by any statute." The

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damages in this action are not given by any statute but by common law.

The views which I have expressed are fatal to the defendant's motion and render it unnecessary for me to pass upon the third point, namely, that, even if the period of limitation was two years, the general terms of the particulars which I have quoted above might permit the plaintiff to shew a cause of action arising within two years before the issue of a writ. I express no opinion upon this argument advanced by the plaintiff.

In the result, the motion is dismissed with costs, to be paid by the defendant to the plaintiff in any event of the action.

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[APPELLATE DIVISION.]

O'HEARN v. YORKSHIRE INSURANCE CO.

Insurance—Indemnity against Loss by Reason of Liability for Damages for Bodily Injuries Caused by Assured—Death of Person Caused by Reckless Driving of Automobile by Assured when Drunk—Criminal Code, sec. 285 — Public Policy — "Intentional Act"—Negligence.

The defendant company issued a policy by which it agreed to indemnify the plaintiff against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries accidentally sustained, including death at any time resulting therefrom. The plaintiff, while driving his automobile upon a public highway, struck and injured a man, who died as the result of his injuries. The plaintiff suffered judgment for damages in respect of the injury to the man, and, having paid the amount, sued the defendant company therefor. The plaintiff was drunk when he struck the man and was driving at an excessive speed. He was convicted of an offence against sec. 285 of the Criminal Code; the Judge at the trial of this action found that he (the defendant) was guilty of the offence; and that finding was not questioned on appeal. The trial Judge held (50 O.L.R. 377) that it was contrary to public policy that the plaintiff should be indemnified against his own criminal act. It was contended for the plaintiff (appellant) that, as the defendant company had not in terms contracted to indemnify against damages recovered for injuries caused by a criminal act, recovery might be had unless the act of the appellant which caused the injury was an intentional act:—

Held, that that contention could not be supported on principle or by authority.

Review of the authorities.

Tinline v. White Cross Insurance Co. (1921), 37 Times L.R. 733, considered and distinguished.

Quere, whether the plaintiff's act was not intentional in the sense that it was done recklessly, without care for what the consequences might be.

Judgment of MIDDLETON, J., 50 O.L.R. 377, affirmed.

AN appeal by the plaintiff from the judgment of Middleton, J., 50 O.L.R. 377.

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September 29. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

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D. L. McCarthy, K.C., for the appellant, argued that the act which had caused the injury was an accidental, not an intentional, one, and therefore the appellant was not barred from recovering against the defendant company: *Tinline v. White Cross Insurance Co.* (1921), 37 Times L.R. 733; *Director of Public Prosecutions v. Beard*, [1920] A.C. 479. Neither the death of the person injured nor the conviction of the appellant affected the rights under the policy.

T. N. Phelan, for the defendant company, respondent, contended that, if the foundation of civil liability rested in crime, the contract was not enforceable, as it was against public policy: *Weld-Blundell v. Stephens*, [1920] A.C. 956; *Lundy v. Lundy* (1895), 24 Can. S.C.R. 650; *Ritter v. Mutual Life Insurance Co. of New York* (1897), 169 U.S. 135, at p. 153.

McCarthy, in reply.

October 24. MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 9th May, 1921, which was directed to be entered by Middleton, J., after the trial before him, at Toronto, without a jury, on that day and the previous 28th April.

The respondent, by its policy No. 33974, agreed to indemnify the appellant against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries accidentally sustained, including death at any time resulting therefrom. The duration of the policy was for one year from the 18th December, 1918, and the liability of the respondent was limited to \$5,000 for one person injured, and subject to that limit to \$10,000 on account of any one accident injuring more persons than one.

On the 11th September, 1919, the appellant, while driving his automobile on King street, in Toronto, struck and injured a man named Plum, who subsequently died as the result of his injuries. Plum was an employee of the Toronto Railway Company, and his dependents received from that company, under the Workmen's Compensation Act, \$6,133.51. The company, being subrogated to the rights of the dependents of Plum, brought an action in their names against the appellant, and recovered judgment against him for \$6,275 and costs, and that judgment has been satisfied by payment—\$1,275 having been paid on the

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9th April, 1920, and the balance on the 8th April of this year; and it is in respect of these damages that the appellant sues.

While driving the automobile, the appellant was drunk, and when he struck Plum he was driving at the rate of about 40 miles an hour. He was convicted of an offence under sec. 285 * of the Criminal Code, and sentenced to two years' imprisonment.

The learned Judge found as a fact that the appellant was guilty of the offence of which he was convicted, and this finding is not questioned.

The respondent contests the claim on the ground that it is contrary to public policy that the appellant should be indemnified against his own criminal act, and the learned Judge so held.

It was very properly conceded by Mr. McCarthy that, if the respondent had in terms contracted to indemnify against damages recovered for injuries caused by a criminal act of the insured, there could be no recovery; but he argued that, as that is not the form of the contract of the respondent, recovery may be had unless the act of the appellant which caused the injury was an intentional act.

I am unable to agree with that contention. It cannot, I think, be supported on principle or by authority, but what authority there is is the other way.

In *Amicable Society v. Bolland* (1830), 4 Bligh N. R. 194, the action was by the assignee in bankruptcy of Fauntleroy, on a policy of insurance on his life. He had been convicted of forgery and executed, and it was held that there could be no recovery because the law will not enforce contracts and agreements which are against public policy and therefore forbidden by public policy.

In his speech, the Lord Chancellor said (pp. 211, 212):—

“It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? namely, the

* 285. Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.

interest we have in the welfare and prosperity of our connexions. Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went at least, altogether void?"

That case was referred to, with approval, in *Ritter v. Mutual Life Insurance Co. of New York*, 169 U.S. 139, 158, 159, and the same conclusion was reached by the Court.

In *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, the action was by the executors of the insured, who had effected an insurance on his life for the benefit of his wife. His death was caused by the felonious act of his wife, and the defendant company resisted payment on that ground, invoking the doctrine of public policy to which reference has been made, but it was held liable, the view of the Court being that, the trust in favour of the wife having become incapable of performance by reason of her crime, the insurance money formed part of the estate of the insured, and that as between his representatives and the defendant company no question of public policy arose to afford a defence to the action.

In *Burrows v. Rhodes*, [1899] 1 Q.B. 816, 828, it was said by Kennedy, J.:—

"It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results to him therefrom."

The question was considered by the Supreme Court of Canada in *Lundy v. Lundy*, 24 Can. S.C.R. 650. In that case land was claimed by the plaintiff as grantee of his brother, to whom his wife had devised it. The brother had killed his wife and was found guilty of manslaughter. It was contended that, his crime having been manslaughter, the rule which, if he had murdered his wife, would have precluded him from taking, was not applicable, but this contention was rejected by the trial Judge and by the Supreme Court, though it had been given effect to in the Court of Appeal. Stating his opinion, the Chief Justice of Canada (pp. 652, 653), referring to the principle which he said was the ground of the decision of Lord Justice Fry in the *Cleaver* case, said it was a principle "which would include all wrongful acts, not merely felonies but misdemeanours;" and,

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speaking of it as a sound principle of universal jurisprudence, he quoted the following passage from the opinion of the Lord Justice:—

“No system of jurisprudence can with reason include among rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible that it can arise from felony or misdemeanour.”

Tinline v. White Cross Insurance Co., 37 Times L.R. 733, if rightly decided, which may be open to question, is, I think, distinguishable. The *ratio decidendi*, as I understand it, was that the plaintiff was insured against accident, that negligence must therefore have been contemplated, as without negligence there could be no liability (i.e., to the person injured), that the defence depended on the degree of negligence, that that was impossible—and that although in the result the person injured had died as the result of his injuries.

I gather from what was said that there was no legislation similar to that in sec. 285 of the Criminal Code, and therefore the negligence of the plaintiff did not constitute a crime, although in the result it was a criminal offence—manslaughter—which was committed. In the case at bar, the appellant's negligence, apart from it resulting in the death of the injured man, was a crime; and, according to the cases to which I have referred, the appellant cannot maintain an action to indemnify him against the injury caused by that act.

If it had been necessary for the defence to establish an intentional act on the part of the appellant, I am not at all sure that his act was not intentional in the sense that it was done recklessly, not caring for what the consequences of it might be.

In my opinion, the action was rightly dismissed, and I would therefore dismiss the appeal with costs.

As I have reached that conclusion, I have not found it necessary to consider the question raised as to the action having been begun too late.

MACLAREN, MAGEE, and FERGUSON, J.J.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—The insurance taken out by the appellant covered any loss by reason of the liability imposed upon him by law for damages on account of bodily injuries accidentally sustained, including death at any time resulting therefrom. The injury in this case resulted in the death of a man lawfully

engaged on work in a public street at night, properly protected by signals on the road.

The appellant was convicted of an offence under sec. 285 of the Criminal Code, and the trial Judge has held that he was guilty of the offence of which he was convicted. In that I agree.

The argument before us was that his unlawful act was not due to negligence, although he might well be convicted of culpable homicide not amounting to murder. The basis of this argument is that, being incapacitated by drink, he could not while in that condition be wilfully negligent. In the case chiefly relied on by the appellant, *Tinline v. White Cross Insurance Co.*, 37 Times L.R. 733, Mr. Justice Bailhache says, "If the act had been intentional the policy would not cover the insured." The policy in this case is "on account of bodily injuries accidentally sustained," and so would not cover the case of harm caused by wilful neglect. The appellant in his evidence denies that he was operating his car east of Sherbourne street at a high rate of speed, 35 miles an hour. So that, while he remembers nothing west of Sherbourne street, he is not shewn to have been incapacitated at a point within a few blocks of where the fatality happened. He was in charge of his car and was driving it, necessitating some degree of volition on his part. His drunkenness is a circumstance to be considered, but it is not established that the appellant was so drunk as to have been incapable of wilful neglect. The learned trial Judge does find that he was intoxicated; but, if he had meant that the appellant was so incapacitated thereby as to be incapable of any intent in the matter, he would not have been able to find that an offence under sec. 285 had been committed. If, as Mr. Justice Bailhache says, negligence was contemplated, but not wilful negligence, I would agree with him that the degree of negligence, whether ordinary or gross, would not affect the question. But the crime committed was not merely the killing of the workman but the wanton or furious driving, within sec. 285, previous thereto, which caused the death. It was when so driving that this neglect, criminal within the statute, arose, and to hold that he can be indemnified against its consequences would be contrary to public policy.

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Appeal dismissed with costs.

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[APPELLATE DIVISION.]

Oct. 24.

FORSTER V. TORONTO R. W. Co.

Street Railway—Passenger Entering South-bound Car by Mistake—Transfer to North-bound Car — Injury to Passenger after Leaving Car — Evidence — Negligence — Findings of Jury — Contributory Negligence—Crossing behind South-bound Car to Reach Transfer-point—Failure to Look out for North-bound Car—Direction of Conductor—Duty—Scope of—Obligation of Street Railway Company,

The plaintiff took passage upon a south-bound car of an electric street railway company; finding that she was going in the wrong direction, she obtained from the conductor a transfer-slip entitling her to passage on a north-bound car of the same line; and, when the south-bound car reached a stopping place, she got off, and, crossing behind that car, attempted to pass over the rails used by the north-bound cars, with the object of reaching the stopping place for north-bound cars, but was struck by a north-bound car and injured. When she got down from the car she was in fear that motor-vehicles would start and put her in peril. She testified, and was corroborated by another passenger, that in doing what she did she followed directions given to her by the conductor of the south-bound car. She admitted that she did not look for an approaching car. Her testimony was contradicted in some respects by the conductor; but he admitted that he was in a hurry to get away from the transfer-point, and he said that the cars were running half a minute apart. The plaintiff sued the company for damages for her injuries, and at the trial the jury found negligence of the company, "by the conductor directing the lady into danger," and that, "being influenced by the conductor's directions, she was unable to avoid the accident:"—*Held* (FERGUSON, J.A., dissenting), that the plaintiff was entitled to recover.

Per MEREDITH, C.J.O. (MACLAREN and MAGEE, J.J.A., concurring):—The jury, accepting the account given by the plaintiff and the other passenger, were warranted in finding negligence. The way the plaintiff was directed to take was, especially in view of the rapid service on the line, a dangerous way to take, and this was or should have been known to the conductor.

It did not necessarily follow that because the plaintiff did not look she was guilty of negligence. The question of contributory negligence is one for the jury, and they might well have thought, as they did think, that she was to be excused for doing what ordinarily would be a negligent act, on account of what was said to her by the conductor, which she might well have thought to have been an assurance by him that there would be no danger from a north-bound car.

Per HODGINS, J.A.:—The case of *Barr v. Toronto R.W. Co. and City of Toronto* (1919), 46 O.L.R. 64, does not establish the proposition that a street railway company is under an obligation to a passenger, when making his way from one car to another on a transfer, greater than where the passenger is put down upon the street at the end of his journey. But in this case what the conductor said and indicated by pointing with his arm amounted not only to a direction of the way the plaintiff should take to utilise her transfer, but to an assurance that in doing so there was, at the moment, no danger to be apprehended. It could not be said that the conductor had gone be-

yond the scope of his authority. What he did was in furtherance of the company's obligation to carry the plaintiff farther; and, while he was not obliged to help her on her way, it could not be said that in doing so he had performed an unwarranted action.

As to contributory negligence, the plaintiff's want of care was met upon the instant by the danger into which she was led by the conductor.

Per FERGUSON, J.A.:—The company did not owe to the plaintiff the duty of giving her a transfer to go back to the point where she made her mistake, or of directing her how, after she left the car, to proceed to the transfer-point so as to avoid the traffic on the highway. Both were gratuitous acts of the conductor, not called for by the contract of carriage, and imposing no obligation upon the company.

AN appeal by the defendant company from the judgment of ROSE, J., at the trial, on his finding as to a release pleaded by the appellant company, and upon the findings of the jury, in favour of the plaintiff for the recovery of \$1,350 and costs in an action for damages for personal injury sustained by the plaintiff by reason, as she alleged, of the negligence of a servant of the defendant company.

The plaintiff was a passenger upon a street-car of the defendants, which she had entered by mistake. Finding her mistake, she obtained from the conductor a transfer-slip and alighted from the car. She was directed by the conductor, as she alleged, to go behind the car in which she had been travelling, and cross to the opposite side of the street; she attempted to follow what she understood to be the instruction given her, and was knocked down by a car going in the opposite direction, and injured. The jury at the trial, in answer to questions, found negligence of the defendant company in "the conductor directing the lady into the danger," and negatived contributory negligence.

The trial Judge found in favour of the plaintiff upon the issue as to the validity of a release of the cause of action set up by the defendant company.

September 28. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Gideon Grant, K.C., for the appellant company, argued that the release of claim executed by the plaintiff should not have been set aside, as there had been no misrepresentation or fraud on the part of the appellant company's agent, nor any undue advantage taken of the plaintiff, who understood thoroughly what she was doing when she signed the release: *Gissing v. T. Eaton Co.* (1911), 25 O.L.R. 50; *Arkles v. Grand Trunk R.W. Co.* (1913), 5 O.W.N. 462, 14 D.L.R. 789. Counsel also contended that, upon the answers of the jury, especially the answer

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to the 3rd question, judgment should not have been entered for the plaintiff. In other words, the plaintiff was guilty of contributory negligence in proceeding to cross the street behind the car without looking to see if another car was approaching. The appellant company could not be held liable for the gratuitous act of the conductor in negligently directing the plaintiff into danger, as in so doing he went outside the scope of his authority: *Ogle v. B. C. Electric R. W. Co.* (1914), 6 W.W.R. 683. The plaintiff had no right to think that the conductor's directions to her amounted to a guaranty of safety: *Ellis v. Hamilton Street R. W. Co.* (1920), 48 O.L.R. 380, 57 D.L.R. 33.

A. G. Slaght, K.C., for the plaintiff, respondent, argued that the release had been improperly obtained, and advantage had been taken of the respondent's weakened condition to obtain the same. On the question of liability, he contended that the jury had accepted the evidence of the respondent as to the conductor by his advice having led her into danger, and so the finding of negligence against the appellant company should stand; nor could the company escape liability by saying that the conductor acted outside his authority. The respondent was not guilty of contributory negligence: *Town of Prescott v. Connell* (1893), 22 Can. S.C.R. 147; *Hill v. Winnipeg Electric R.W. Co.* (1911), 21 Man. 442; *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155, at p. 1166; *Jones v. Toronto and York Radial R.W. Co.* (1910), 21 O.L.R. 421. The company's obligation to a transferring passenger is greater than to one alighting at the end of a journey: *Barr v. Toronto R. W. Co. and City of Toronto* (1919), 46 O.L.R. 64, 49 D.L.R. 444.

.Grant, in reply.

October 24. MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 27th May, 1921, which was directed to be entered by Rose, J., on his finding as to the release pleaded by the appellant, and on the findings of the jury, at the trial at Toronto on that and the previous day.

The respondent sues to recover damages for personal injuries alleged by her to have been sustained owing to the negligence of the appellant.

The respondent took passage on a south-bound Broadview car of the appellant, at the corner of that avenue and Danforth avenue, intending to go to Muriel street, the locality of which she did not know. She took passage on this car because she was informed by a gentleman that it was the proper one by which to reach her destination. Finding, as I gather from the evidence, that she was going in the wrong direction, she obtained from the

conductor a transfer to the north-bound Broadview line. When the car reached the stopping-place at Withrow avenue, according to the respondent's testimony, the conductor told her to "jump out" or "now, get out quick"—she makes use of both expressions. The respondent, seeing an automobile approaching, desired to stop until it had passed, and the car she was on had moved on, when she intended to cross the road to take the upbound car or get to the nearest pavement—it is not clear which. According to her testimony, the automobile had not quite stopped, and the conductor said to her, "Get off the step, I must start this car." She replied, "Half a minute till the car stops," to which the conductor answered, "Come this way, that car won't hurt you, come this way," that the conductor got off the step and "pointed round with his arm" for her to go behind the car.

Acting, as she said, upon this, she proceeded to pass behind the car she had been on, on her way to the stopping place. She also testified that she told the conductor that that was not the right way, and that he said it was quite safe. The respondent was hurrying on on her way and after taking two steps she was knocked down by the north-bound car and injured. She did not look to see if a car was coming. It appears that there was a motor-truck also a few feet behind the car on which the respondent was. Mrs. Davis, who was on the car, testified that, when the car came to the stopping place, the respondent got up to get out, and that there was an auto-truck standing and it had scarcely stopped, that the engine was running, that the respondent got on the step, and the conductor motioned to her to come and spoke to her, but that she did not hear what he said, that the respondent then got on the pavement, and the conductor got one foot down and swung around the car and "pointed behind the car."

The testimony of the respondent and Mrs. Davis was contradicted in some respects by the conductor of the car (Leonard Gordon Spicer). According to his testimony, the auto-truck was 25 feet away and the other automobile just behind it; the respondent hesitated and did not want to get off, because she was afraid that they would pass the car while she was getting off, he told her it was quite safe for her to leave the car, as "autos" must stop behind standing street cars; she then stepped off; he then rang the bell for the car to start and turned around and saw her step "right immediately behind the car." He denied having gone down on the step and pointed around the back of the car for the respondent to go that way, or having indicated to her that

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she was to go behind the car, and said that he did not tell her to hurry; that all that he did was to tell her that she would have to cross the street to take the north-bound car; he admitted that it was a "hurry up job to get the car away from the transfer-point," and that he got a "little impatient at her at the end because she did not understand and did not mean to."

It appears also from the evidence of the conductor that the cars were running half a minute apart.

The jury found as follows:—

"Q. 1. Were the injuries of which the plaintiff complains caused by the negligence of the defendants? A. Yes.

"2. If so, in what did such negligence consists? A. By the conductor directing the lady into danger.

"3. Could the plaintiff have avoided the injury by the exercise of reasonable care? A. Being influenced by the conductor's directions, she was unable to avoid the accident."

It is plain that the jury accepted the account given by the respondent and Mrs. Davis as to her having been directed by the conductor to pass behind the car in order to reach the transfer-point, and if they accepted that account they were, in my opinion, warranted in finding negligence. It was, especially in view of the rapid service on the line, a dangerous way to take, and this was or should have been known to the conductor.

It was argued that, upon her own shewing, the respondent was guilty of contributory negligence; that she admitted that she did not look for an approaching car before proceeding to cross the uptown rails. It does not necessarily follow that because she did not look she was guilty of negligence. The question of contributory negligence is one eminently for the jury, and they may well have thought, as they did think, that she was to be excused for doing what ordinarily would be a negligent act, on account of what was said to her by the conductor, which she may well have thought to have been an assurance by him that there would be no danger from a north-bound car.

It was suggested upon the argument that she could not have thought, and if she had thought there was no warrant for her thinking, that the conductor's action was an assurance that there was no danger from other vehicles. Admitting that, the answer is, I think, that the question is not, had she been injured by another kind of vehicle, whether she would, as against it, have been guilty of contributory negligence; but the question is, as to the appellant and its cars, was she guilty of such negligence? It may well be that in crossing as she did she took the risk of injury by other vehicles, but it surely does not lie in the mouth of one, who has assured another that he may safely do something

without fear of danger, to say to the person who has done it that he was negligent for not having done that which he had told him he need not do.

In dealing with the question of contributory negligence the jury in all probability took into consideration the age of the respondent and the excitement under which she was labouring owing to the urgency of the conductor in having her leave the car and the fear she was apparently under of danger from the motor-truck and the automobile.

In my opinion, the appeal fails and must be dismissed with costs.

We disposed of the appeal as to the finding of the learned Judge on the issue as to the release pleaded by the appellant adversely to it, and that appeal also should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—It is somewhat hard to believe that the conductor should have, in fact, directed the respondent to cross the street behind his car, a thing that is reprobated by the company and universally known to be wrong and dangerous. The question, however, is whether the findings of the jury are sufficient to make the appellant, as a company, liable: *Ogle v. B. C. Electric R. W. Co.*, 6 W.W.R. 683 (Supreme Court of Canada). It was the respondent who put herself in motion, and she, in following the conductor's direction, was bound to make her way with care and circumspection. It was argued that the company was under an obligation to a passenger, when making her way from one car to the other on a transfer, greater than had the passenger been put down upon the street at the end of her journey.

The case of *Barr v. Toronto R.W. Co. and City of Toronto*, 46 O.L.R. 64, 49 D.L.R. 444, is cited as authority. I do not think that what was said in it necessarily establishes the proposition of law contended for. There, the company put the passengers down on the street under circumstances which left them no option as to the path they should take to get to the sidewalk, and then, while they were on that path, wrongly manipulated their car so as to injure them. This was sufficient to make the company liable, irrespective of the fact that they were intending to resume their journey on another car of the company, by virtue of the transfer-slip. Here, however, when the respondent finally got down and stood waiting in apprehension that the motor-cars

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would start and so put her in peril, the conductor indicated that she could cross the street behind the car, and that she could do this safely. This amounts, not only to a direction of the way the respondent should take to utilise her transfer, but to an assurance that in so doing there was, at the moment, no danger to be apprehended.

The case of *Ellis v. Hamilton Street R.W. Co.*, 48 O.L.R. 380, 57 D.L.R. 33, decides that an electric company discharging a passenger on the street is not responsible for that passenger's injury in crossing the street, and is not bound to warn the passenger. But, when the conductor undertakes to guide the passenger by indicating when and how she is to proceed so as to use a transfer-slip, and adds an assurance that his advice may be safely followed, I think the appellant cannot successfully argue that he has gone beyond the scope of his authority. What he did was in furtherance of the company's obligation to carry the passenger farther; and, while he need not help her on her way, it cannot be said that if he does do so he has performed an unwarranted action.

I think this case illustrates one of those positions which, as I ventured to point out in the *Ellis* case, might render a street railway company liable.

Whether or not the act that the conductor did was negligent may be judged by its consequences, if the result indicates that a reasonable man should have anticipated that what happened might be a natural result of that act. In this case the conductor was on the platform of a car in which the door was on the east side, and so permitted a view into the interior and through the windows of the car on that side. If he looked he was in a position to judge of the correctness of his advice, and if he did not look he was careless.

There is more difficulty upon the question of contributory negligence. But the respondent's want of care was met upon the instant by the danger into which she was led by the conductor, and it is unnecessary to consider what her rights might be had she escaped the immediate hazard and attempted to cross the remaining part of the street and failed to avoid a motor-car on it beyond the appellant's tracks.

On the whole and with some doubt, I think the appeal should be dismissed.

FERGUSON, J.A.:—To my way of thinking, the defendant railway company did not owe to the plaintiff the duty of giving her a transfer to go back to the point where she made her mistake, or of directing her how, after she left the car, to proceed to the

transfer-point so as to avoid the traffic on the highway. Both acts were gratuitous acts of the conductor, not called for by the contract of carriage. No doubt they owed her the duty to provide a reasonably safe place to alight and to give her opportunity to do so—these things they did. Had the transfer been properly given, it would have been the duty of the defendant company, if asked to do so, to indicate the point of transfer and tell the plaintiff that, after she left the car, she must cross the highway in order to reach that point, but it seems to me a different thing to say that the company was under a legal duty to give the transfer and also to direct and instruct the plaintiff when and how she could cross the highway, so as to avoid being injured by other vehicles or persons on the highway: *Ellis v. Hamilton Street R.W. Co.*, 57 D.L.R. 33, 48 O.L.R. 380; *Oddy v. West End Street R.W. Co.* (1901), 178 Mass. 341, at p. 349.

It may be that, though neither the railway company nor its conductor was under any antecedent obligation to give the transfer, or to advise and direct the plaintiff how to proceed so as to avoid the dangers of the traffic, yet, the conductor having gratuitously undertaken to do so, the law cast on him the duty to do what he had undertaken without negligence; but I am of opinion that the conductor could not and did not, by gratuitously assuming to do something not called for by the contract between the plaintiff and the company, impose upon his employer a duty or obligation arising outside of its contract: see *Birmingham Railway Light and Power Co. v. Seaborn* (1910), 168 Alabama 658, at p. 662.

To hold the defendant company liable because its conductor, impelled by kindly and decent instincts, but without legal duty to do so, undertook to assist this lady by giving her a transfer which the company was under no legal obligation to supply, and advising her how and where to go to make use of such transfer, with the result that she was injured by the ordinary traffic, would, I think, be putting a premium on incivility.

I would allow the appeal.

Appeal dismissed (FERGUSON, J.A., dissenting).

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RE DOMINION SHIPBUILDING AND REPAIR CO. LIMITED.

HENSHAW'S CLAIM.

Company—Winding-up—Creditor's Claim—Special Privilege or Priority over Ordinary Creditors—"Clerks or other Persons"—Arrears of Salary or Wages—Winding-up Act, sec. 70—Contractor or Servant.

Upon appeal by the liquidator of the company from the order of MASTEN, J., 50 O.L.R. 350, the Court took a different view of the facts and reversed the order, holding that the respondent (the claimant) was not a clerk or other person in the employment of the company to whom salary or wages were due, within the meaning of sec. 70 of the Winding-up Act, R.S.C. 1906, ch. 144, but that he was a contractor with the company for the doing of the work which he was engaged to do.

Saunders v. City of Toronto (1899), 26 A.R. 265, followed.

In re Field (1887), 4 Morr. (Bkey.) 63, distinguished.

Cairney v. Back, [1906] 2 K.B. 746, considered.

AN appeal by the liquidator of the company from the order of MASTEN, J., 50 O.L.R. 350.

September 26. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

G. M. Willoughby, for the appellant, argued that the claimant was not a clerk or other person within the meaning of the Winding-up Act, R.S.C. 1906, ch. 144, sec. 70, but was an independent contractor: that he was not claiming in respect of wages earned by him personally, but in respect of piece-work, agreed by him to be completed at an agreed rate per piece; and that the claimant personally engaged and paid the labourers engaged upon the piece-work, and there was no agreement by the company to pay these labourers. Section 70 of the Act presupposes the worker to do the work himself, whereas here it was done by the employees of the claimant. Reference to *Saunders v. City of Toronto* (1899), 26 A.R. 265; *Cairney v. Back*, [1906] 2 K.B. 746; 13 *Corpus Juris*, p. 211; *Hale v. Johnson* (1875), 80 Ill. 185.

W. Zimmerman, for the claimant, respondent, contended that he was not an independent contractor, but was a clerk or other person within the meaning of the Act. Having men working for him did not make him an independent contractor: *In re Field* (1887), 4 Morr. (Bkey.) 63. He was under the control of the general manager and superintendent of the company, and he was subject to direction, control, and dismissal by these officers. The contract was one "for service, not for services," as found

by the learned Judge below. He referred to the following authorities: *Ex p. Allsop* (1875), 32 L.T.R. 433; *Re Parkin Elevator Co. Limited, Dunsmoor's Claim* (1916), 37 O.L.R. 227, 31 D.L.R. 123; *Re Western Coal Co. Limited* (1913), 12 D.L.R. 401.

Willoughby, in reply.

October 24. The judgment of the Court was read by MEREDITH, C.J.O.:—This is an appeal by the liquidator from an order of Masten, J., dated the 28th April, 1921, reversing an order of an official referee (Cameron) dated the 8th March, 1921.

The question for decision is as to the right of the respondent to rank as a privileged creditor in respect of his claim against the company.

The respondent was collocated by the liquidator on the dividend-sheet as an ordinary creditor, and an appeal was dismissed by the referee, whose order was reversed by the order of my brother Masten.

Section 51 of the Bankruptcy Act of Canada, 1919, provides that, after payment of the fees and expenses of the trustee and certain costs of an execution creditor, there shall next be paid, "all wages, salaries, commission or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment."

The proceedings, however, have been under the Winding-up Act, R.S.C. 1906, ch. 144, sec. 70 of which provides that "clerks or other persons in or having been in the employment of the company in or about its business or trade, shall be collocated in the dividend-sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the 3 months next previous to the date of such order;" and it has been assumed throughout that that section, and not sec. 51 of the Bankruptcy Act of Canada, 1919, is the provision upon which the rights of the respondent depend.

As the correctness of that assumption was not challenged by counsel for either party, I shall deal with the case on the footing that sec. 70 of the Winding-up Act is the section to be applied.

I am, with great respect, unable to agree with the opinion of my brother Masten.

I do not take the same view of the facts as was taken by him.

The respondent was not, as I understand the evidence, to work exclusively for the company.

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Asked: "Did you work all the time?" the answer of the respondent was: "I couldn't work all the time. I had to take care of my mills. Had to be away from my work 50 per cent. of the time."

The fair assumption from this is that he was not bound by his arrangement with the company to give his personal attention to the work he was to do for it, but that it was to be open to him to work elsewhere if he chose to do so.

My brother Masten adopted the view that the respondent was to work personally and exclusively "on this job." He also accepted the respondent's view that the evidence established that "he worked under the general rules of the company as to hours, time-checks, and other matters, did his work under the supervision in all respects of the general manager and of the superintendent of the company, and that he was subject to direction, control, and dismissal at any time by these superior officers—in other words, that his contract was a contract for service, not for services, to be paid for at piece-work rates; further, that the company had control not only over the claimant but also over the subsidiary workmen whom the claimant employed; and that they also worked subject in all respects to the rules of the company."

I am unable to agree that what the learned Judge so finds is supported by the evidence.

There was a good deal of loose testimony as to how the work was carried on, and there were opinions expressed as to what the rights and duties of the parties were, but even these did not go so far as the findings.

A perusal of the evidence satisfies me that there was no interference by the company or its manager or superintendent with the respondent, beyond that to which he was properly subject as a contractor for the doing of the work which he undertook. There was no term fixed for the duration of the employment, and it was therefore open to either party to put an end to it at will. In the very nature of the contract, it rested with the company to say at what work the respondent should be employed. Various kinds of work were to be done by him—furnace-work, angle-work, and liner-work—and this necessitated the putting him by the company at the particular kind of work he was to do; and, as I read the evidence, no more than this was done by the manager or by the superintendent. And so, too, if the work was not properly done, what the manager or superintendent did was not to pass it until it was properly done, just as would be done in the ordinary case of a building contract. I find no warrant in the evidence to support the conclusion as to the position of the subsidiary workmen. The respondent employed whom he chose

and the only interference, if it can be called interference, by the company, was to give advice as to the character of the men whom he desired to employ. The respondent's men were sometimes taken off his work and put to work by the company at something else that the company had to do; but this was not done as a matter of right; indeed, all that is relied on by the respondent is just what would happen between the company and a contractor who had to do his work on the premises of the company, where each would naturally accommodate the other where it was reasonable to do that.

Reliance is placed on the respondent having worked under the general rules of the company as to hours, time-checks, and other matters. What those rules were is not shewn, and one would expect that a contractor employed to do such work as the respondent had to do on the premises of the person for whom he was doing it, and his workmen, would conform with the rules of the employer, especially in a large yard where many men were employed.

In my view, the rights and duties of the parties are to be determined not by opinions of the general manager or of the respondent as to what these were, or even by what happened in the working out of the arrangement between the parties, but by the terms of the agreement which was entered into between them. What this was is stated by the general manager to have been for the respondent "to do furnace-work, angle-work, liner-work which is in his line at so much per piece;" and what was contemplated was that the respondent should bring his men—his organisation, as the respondent termed it—to do the work. According to the testimony of the respondent, the arrangement was that he should bring his men with him and "take on work on piece-work" at the price he was getting at Port Arthur and \$400 per ship extra.

My conclusion is that the respondent was not a clerk or other person in the employment of the company to whom salary or wages were due, within the meaning of sec. 70, but that he was a contractor with the company for the doing of the work.

I am unable to distinguish this case from *Saunders v. City of Toronto*, 26 A.R. 265. *Stephen v. Thurso Police Commissioners* (1876), 3 Ct. of Sess. Cas., 4th ser., 535, was referred to in that case, and the view of the law taken by Lord Gifford (p. 542) was concurred in by Burton, C.J.O.; and Osler, J.A., agreed with the views of the Lord Justice-Clerk and Lord Ormisdale.

On the facts, as I view them, none of the cases referred to by my brother Masten has any application, and I have no doubt

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that had my learned brother taken my view of the facts, his conclusion would have been against the claim of the respondent. I judge so from what he said in *Re Parkin Elevator Co. Limited, Dunsmoor's Claim*, 37 O.L.R. 277, 284, *et seq.*

In re Field (1887), 4 Morr. (Bkey.) 63, is distinguishable. In that case the employer could discharge the claimant at a week's notice, and he had the right to discharge and engage all men working in the brickyard, and to make alterations in the rate paid per thousand for the bricks, which was the way in which the claimant was paid.

The observations of Walton, J., in *Cairney v. Back*, [1906] 2 K.B. 746, referred to by counsel for the appellant, seem to be inconsistent with what was decided by the Chief Justice in *Ex p. Allsop*, 32 L.T.R. 433. That case was not referred to in *Cairney v. Back*, and it may be that the decision of Walton, J., is not good law.

On the whole, my conclusion is that the respondent is not entitled to the special privilege mentioned in sec. 70, and I would reverse the order of my brother Masten and restore that of the official referee, and I would leave the parties to bear their own costs of the appeal to my brother Masten and of this appeal.

Appeal allowed.

†

[APPELLATE DIVISION.]

RE HAMMOND.

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Oct. 24.

Dec. 16.

Will—Charitable Bequest—Discretion of Trustees—Charities Having to Do with “Young War Widows” Residuary Gift—Certainty—Validity—Claim of Soldiers’ Aid Commission of Ontario to Administer Fund—Testatrix Domiciled in Ontario—Soldiers’ Aid Commission Act, 1916, 6 Geo. V. ch. 3—Amending Acts 7 Geo. V. ch. 27, sec. 60, and 9 Geo. V. ch. 25, sec. 34—Soldiers’ Children’s Protection Act, 1920, 10 & 11 Geo. V. ch. 29—Application of Bequest to Charities outside of Ontario—Costs.

The testatrix, after making specific bequests in her will, gave “the remainder of my money”—about \$200,000—to her executors and trustees, “to be invested in War Charities at their discretion, these charities to be selected by” the executors and trustees, “and which charities are more particularly to do with young war widows who are left widows by the war and need help.” The two men named as executors and trustees lived in England. The testatrix died in the State of New York, but had a fixed place of abode in Ontario, where she had lived with her husband before the war. In the will she described herself as of London, England, but temporarily residing in New York State. She had gone to England with her husband during the war; and, after his death at the front, she remained in England, taking an active part in war-work. Her health broke down and she returned to Canada; she went to the place in New York where she died, in the hope of improving her physical condition. A motion was made by the executors, upon originating notice, for the determination of three questions arising in the administration of the estate, and it was *held*, by MIDDLETON, J.:—

- (1) That the gift of the residue was not too vague or uncertain: the fact that the charities were not named, but left to the selection of the trustees, did not interfere with the validity of the gift: a charitable bequest never fails for uncertainty.

In re White, [1893] 2 Ch. 41, followed.

- (2) That the Soldiers’ Aid Commission, established in Ontario by the Soldiers’ Aid Commission Act, 1916, 6 Geo. V. ch. 3, which Act was amended by (1917) 7 Geo. V. ch. 27, sec. 60, and (1919) 9 Geo. V. ch. 25, sec. 34, and supplemented in 1920 by the Soldiers’ Children’s Protection Act, 1920, 10 & 11 Geo. V. ch. 29, was not entitled to have the administration of the fund created by the testatrix confided to it. The provision (*7a.*) added to the original Act by 7 Geo. V. ch. 27, sec. 60, and amended by 9 Geo. V. ch. 25, sec. 34, applies only to gifts for the benefit of returned men—the gift was in much wider terms than the statute.
- (3) That the trustees had an unfettered discretion as to the war charities to be benefited—they were not limited to charities in Canada.

Upon appeal by the Soldiers’ Aid Commission, the second ruling was affirmed by a Divisional Court.

Remarks upon the character and effect of the legislation.

The appeal was dismissed without costs.

MOTION by the executors of the will of Kathleen Saunders Hammond, deceased, for an order determining certain questions arising in the administration of her estate.

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June 22. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

W. Lawr, for the executors.

A. J. Thomson, for certain adult next of kin.

F. W. Harcourt, K.C., for the infant next of kin.

C. M. Garvey, for the Soldiers' Aid Commission of Ontario.

October 24. MIDDLETON, J.:—The late Mrs. Hammond died on the 22nd September, 1919, at Saranac Lake, New York, being domiciled and having a fixed place of abode at the city of Toronto.

By her will, made on the 23rd August, 1919, at Saranac Lake, she described herself as "of the city of London, England, now temporarily residing at" Saranac Lake. After very many substantial pecuniary and specific bequests to her relatives, and all those who she thought had a claim upon her, her will concludes with the following provisions which have given rise to this application:—

"Twenty-sixth: I give devise and bequeath unto my executors and trustees hereinafter named in trust the remainder of my money (which amounts to something like two hundred thousand dollars (\$200,000) consisting of the money coming from Mrs. Hammond by will at her death together with the remainder of my present moneys that is left from my present capital also the dividends and payments coming in from my present securities in the West and the Paradise Mine, to be invested in War Charities at their discretion, these charities to be selected by Mr. de Pass and Mr. Cook, and which charities are more particularly to do with young war widows who are left widows by the war and need help."

The two gentlemen named are by a separate clause appointed executors and trustees of the will. Both of them reside in London, England.

To understand the situation, it may be mentioned that Mrs. Hammond went to England with her husband during the war. After his death at the front, she remained in England, taking an active part in war-work. Her health broke down and she returned to Canada, and went to Saranac Lake in the hope of improving her physical condition, but died there. Before the war she resided with her husband in Toronto. Her husband, a man of considerable means himself, was entitled under his father's will, upon the death of his mother, to funds that had been set aside to provide for her annuity.

Before me several questions of difficulty and importance were argued. First, the next of kin of Mrs. Hammond contend that

this gift is too vague and uncertain, and therefore fails, and, as it is residuary, there is an intestacy as to these funds. Second, Mr. Garvey, representing the Soldiers' Aid Commission, contends that the effect of the legislation constituting the Soldiers' Aid Commission is that the whole of this fund passes to his clients for administration. Third, assuming that neither of these contentions is well-founded, is the fund to be administered by trustees for the benefit of war charities in Canada, or have the executors the right in their discretion to use the money for the charities in England which aid young war widows needing help?

A number of minor matters relating to specific devises were argued upon the motion. These were all dealt with upon the argument, judgment being reserved only in the matters that I have mentioned.

The contention of the next of kin is easily disposed of. The gift is to charities, and the fact that the charities are not named, but left to the selection of the trustees, does not interfere with its validity. It is true that the testatrix limits the character to "war charities," but this does not take the case out of the rule. A "general charitable intent" is necessary where there is a failure of the particular named charity, but it is not suggested here that there are not war charities enough, nor that there are not war charities enough caring for young and needy war widows.

"A charitable bequest never fails for uncertainty:" *In re White*, [1893] 2 Ch. 41.

The claim put forward by Mr. Garvey must next be considered. His contention is that the result of the legislation is that all such gifts as that now in question go to the Soldiers' Aid Commission, notwithstanding the express wish of the testator.

The Soldiers' Aid Commission was established by the Ontario Soldiers' Aid Commission Act, 1916, 6 Geo. V. ch. 3. The object of the Commission is to grant aid to members of the Canadian Expeditionary Force or Canadian members of the Imperial Forces and to returned men, particularly in the way of training men who are unable to pursue their calling after their return. The Commission is, by sec. 10, to have such further powers and duties "with respect to soldiers returning to Ontario during or after the war" as may be conferred or imposed by order in council "with a view to securing their well-being in such manner as may be deemed advisable."

In 1920, by the Soldiers' Children's Protection Act, 1920, 10 & 11 Geo. V. ch. 29, the Commission is given wide powers with reference to the aiding and protection of the children of any per-

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In 1917 (by 7 Geo. V. ch. 27, sec. 60) sec. 7*a*. is added to the original Act, and by it the Commission is given the power to receive gifts, devises, and bequests for the benefit of the classes of persons mentioned in the Soldiers' Aid Commission Act, and it is further provided that when by the will of any person a devise or bequest is made to or for the benefit of any class of persons mentioned in the original Act, or for any object within the powers of the Commission, or for any like purpose, and the devise or bequest is void for uncertainty as to the persons entitled to receive the same, or as to the object to which the same may be applied, the Commission shall receive and administer the gift.

This being the state of the law down to 1919, in that year, by 9 Geo. V. ch. 25, sec. 34, the statute was amended, and it is upon this amendment that the claim is based. As amended this section (7*a*.) reads:—

“Where by the will of any person dying before or after the passing of this Act, a devise or bequest is made to or for the benefit of any class of persons mentioned in section 4, or for any object within the powers of the Commission, or for any like purpose, and such will does not specify the particular person, society or institution that is to receive such devise or bequest, or if such devise or bequest is or may be held to be void for uncertainty as to the persons entitled to receive the same, or as to the object to which the same may be applied, then in any such case the Commission shall be the beneficiary and shall be entitled to receive, administer and dispose of the same, in such manner as the Commission may deem expedient.” This “shall apply and take effect notwithstanding that by the terms of any such will the executor or trustee thereunder is directed to distribute such devise or bequest in the discretion of such executor or trustee.”

By the amendment the original salutary provision guarding against the failure of the benevolent intention of testators, by reason of uncertainty arising from the use of vague and indefinite terms, becomes a retroactive Act, doing violence to the wishes of the testator and confiscating the funds which he has set apart, taking them for the benefit of the Government of the Province, which would otherwise have to provide the funds necessary for the carrying on of the work of the Commission. This Act is probably without a parallel in the history of legislation, and calculated to discourage all attempts on the part of testators to confer benefits upon the returned soldier.

A Department of the Government carrying on even the most

beneficial work does not commend itself to the charitable instincts of testators, particularly since the burden of charitable institutions upon the Government was put forward as the justification of the Succession Duties tax (R.S.O. 1897, ch. 34, preamble).

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The claim now made therefore calls for the closest scrutiny.

The answer to it is, I think, plain. This will does not come within the term of the Act. The gift is to the trustees for the benefit of "war charities," particularly those having "to do with young war widows who were left widows by the war and need help." I have no doubt that all institutions that care for the returned soldier are war charities, but there are many other charities and institutions that fall within that description. The Act applies only to gifts for the benefit of returned men; and, even if the Act of 1920 is to be considered, it only adds their children to the class to be benefited. This gift is in much wider terms than the statute and covers all war charities. The direction with reference to young war widows shews that the primary wish of the testatrix was not to benefit the returned soldier, but to benefit the widow of the man who did not return or who died after returning.

There remains the question whether the charities are to be those in the Province only, or whether the executors may name English charities.

I can see no reason why this lady may not have intended her executors and trustees to have full discretion, nor why I should read into this will any restriction or limitation. She was, it is true, domiciled in Ontario, but she describes herself as of London, England. She had lived in England for some years, and had taken an active part in war-work there, and reposed her confidence in two English gentlemen. I can see no reason for imposing any limitation upon the unfettered discretion she has given her trustees in the choice of the war charities to be benefited.

The executors and the Official Guardian may have their costs from the estate. I can see no reason for allowing the next of kin or the Commission any costs out of this fund.

The Soldiers' Aid Commission of Ontario appealed from the judgment of MIDDLETON, J.

November 20. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL and LATCHFORD, JJ., and FERGUSON, J.A.

C. M. Garvey, for the appellants.

W. Lawr, for the National Trust Company, representing the executors of the will of Kathleen Saunders, deceased.

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December 16. MEREDITH, C.J.C.P.:—Notwithstanding all that has been said, this case, as far as we are rightly concerned in it, is quite an uncomplicated one, and is altogether comprised within a narrow compass; and, indeed, is fully embraced in the single question: has provincial legislation changed the trustees of this will in regard to the “war charities?”

Among many things done by this Province for the benefit, directly and indirectly, of those connected with it who served their country in the recent war, it created a “Soldiers’ Aid Commission,” in connection with and as “a branch sub-committee” of its “military hospital committee,” “to take care of and find employment for” such persons and “to assist, advise, and co-operate with” the military hospital commission, “and with all provincial or local committees or organisations, to attain the aforesaid objects, and to do all things which may be incidental and ancillary to the foregoing.” This was done in 1915, and was confirmed by provincial legislation in 1916: The Soldiers’ Aid Commission Act, 6 Geo. V. ch. 3 (O.)

The work of the Commissioners was to be done without remuneration: and it seems to have been so well done, and to have been so beneficial, that the powers of the Commission were from year to year extended by like legislation.

In 1917 they were given power to receive, administer, and dispose of gifts, devises, and bequests for the benefit of persons belonging to any of the classes mentioned in the earlier legislation; and to acquire cemeteries for the burial of such persons: and this enactment further provided for the administration and disposal of devises and bequests for the benefit of such persons, or for any object within the powers of the Commission, *or for any like purpose*, by the Commission, in cases such as I shall presently more fully state: 7 Geo. V. ch. 27, sec. 60 (O.)

In 1919, their power was again extended, as I shall also presently more fully set out: 9 Geo. V. ch. 25, sec. 34 (O.)

And again, in 1920, still further power was conferred upon them: this legislation relates altogether to children of any person “who served with His Majesty’s forces or the forces of any of the Allies of His Majesty in the late war,” and gives very wide power to the Commission as to them. It is helpful on the question involved in this appeal in making plain the usefulness of the Commission, and the confidence of the Legislature in its honorary members, and that its usefulness was not to be employed only for the benefit of the men individually, but was to be extended to their families: The Soldiers’ Children’s Protection Act, 10 & 11 Geo. V. ch. 29 (O.)

Putting all this legislation together, in so far as it affects the question involved in this case directly, and using only the words of the Legislature, but using all their words, it is as follows: "60 (2). Where by the will of any person dying before or after the passing of this Act, a devise or bequest is made to or for the benefit of any class of persons mentioned in section 4, or for any object within the powers of the Commission, or for any like purpose, and such will does not specify the particular person, society or institution that is to receive such devise or bequest, or if such devise or bequest is or may be held to be void for uncertainty as to the persons entitled to receive the same, or as to the object to which the same may be applied, then in any such case the Commission shall be the beneficiary and shall be entitled to receive, administer and dispose of the same, in such manner as the Commission may deem expedient. 34 (2). Sub-section 2 of section 7*a*. aforesaid as amended by the next preceding section shall apply and take effect notwithstanding that by the terms of any such will the executor or trustee thereunder is directed to distribute such devise or bequest in the discretion of such executor or trustee."

If it be of any consequence what the thoughts of any Judge may be as to the merits or demerits of any legislation which he is judicially called upon to interpret or enforce, then I am bound to say that I can perceive nothing objectionable, not to speak of confiscatory, in this remedial, and, I feel bound to add, beneficent, legislation: its very plain main purpose is: to aid and comfort those who went forth to fight for their country: to aid and comfort them directly and through their families: and to do this through a body of prominent gentlemen, competent as any can be, and who give their services gratuitously: services which must hitherto have been successful and very satisfactory, else the public through their representatives in the Legislature should not have continued them, and added to their powers from year to year. The provisions for saving gifts which the Courts might destroy upon what many might think "legal technicalities," should be deemed praiseworthy by even the Judges who were the destroying implements.

But, leaving unmentioned other remedial and praiseworthy features of this legislation, let me come to this very instance, and ask what can there be that is reasonably objectionable, if the administration of the "war charities" in question were taken out of the hands of the two executors of the will and placed in those of the Commission?

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It can hardly be said that these two gentlemen, whether they have or have not had any kind of experience in such things, are the more competent trustees: it is quite out of the range of possibility that their experience, if any, can be comparable to that which the gentlemen of this Commission have had and are having; and so too of the knowledge which experience brings. Nor can it be good, or indeed anything but bad, that there should be many trustees dispensing many charities, in the one field, which one Commission can alone better cover. Very many trustees must be paid for that which one Commission could much better do for nothing. "Overlapping" must occur with numerous trustees. Idiosyncracies of many individuals may be given full play: whilst if trustees have any real knowledge of that which is best, or which the giver desired, they have only to communicate it to the Commission so that the fullest weight may be given to it. And it is quite erroneous to assume that the giver would object to a change of trustees; indeed, if fully informed, it is hardly likely that the less efficient and more costly should be preferred to the more efficient and less costly. The purpose of the giver is not to benefit the administrator of the gift, it is to benefit those who are the object of it.

So, too, it must not be forgotten that all Courts and Judges are under legislative command to treat these enactments as remedial legislation and to give them "such fair, large and liberal construction and interpretation as will best ensure the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof." So too we must not forget that Courts and Judges frequently change trustees in the interests of the trusts: and should hardly grumble at the highest Court doing so. Foreign and non-resident trustees are not favoured; indeed remaining out of Ontario for more than 12 months is by legislation in this Province made a ground for the removal of a trustee.

Then, returning from this digression, which seemed to me to be needful, having regard to the wide scope of the argument here and in the Court below, to the question whether this case is within the legislation, to which I have referred, I am obliged, after some hesitation, to say that I am not convinced that it is.

I have no doubt that the words "or for any like purpose" are wide enough to bring "war charities," "more particularly to do with young war widows who are left widows by the war and need help," within these enactments. There is none more closely

connected with a man than his wife; and none, ordinarily, that, in view of his death, he strives harder to benefit, and to have cared for, after his death. In these things man and wife are one, she benefits generally as much as, often more than, he, from bounties such as those administered by the Commission: how then could it be said that a continuance of the bounty to the wife after the husband's death, when it should be all the more needed for his children as well as his widow, is not "any like purpose?"

But there is nothing in any of the enactments, except the words "or any like purpose," to indicate that wife or widow could be benefited directly; and children are not brought in until the year 1920, and then by legislation expressly doing so. But that which perhaps has most weight in my mind upon this question is: that in the enactment in which the words "for any like purpose" appear—sub-sec. 2 of sec. 60—that sub-section is immediately preceded by another (1), which gives the Commission power to receive and administer gifts, but only for persons mentioned in the enactment of 1916, which does not include wives or widows or any one of the female sex: and that sub-sec. 2 is immediately followed by another sub-section (3) in which the power in regard to cemeteries is conferred on the Commission, but only expressly for the burial of persons belonging to any of the classes mentioned in the enactment of 1916: though it can hardly have been meant that neither wife nor child should be buried near husband and father; yet there is no authority to the Commission to bury them, or to acquire a cemetery for their burial.

I am therefore in favour of dismissing this appeal; but should do so without costs. The Commission is performing an important and onerous public duty gratuitously: the will and the enactment together made it their duty to test the question whether the administration of the bounty in question should be undertaken by them: it was anything but plain that if they did not undertake it they should be guilty of a dereliction of duty. The case seems to me therefore to have been one in which they should have been allowed their costs in the Court below: but they were not, no doubt by reason of that which I consider an erroneous view of the character of the legislation in question. No question was raised as to whether the legislation in question is inapplicable to these trusts by reason of their extra-territorial character in part or otherwise: therefore it has received no consideration.

RIDDELL, J.:—I have read the statutes bearing upon the Commission and have carefully considered them in their relation to

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the provisions of the will in question: and I agree in all respects with the judgment appealed from. The appeal should be dismissed; but, both parties agreeing, there will be no costs.

LATCHFORD, J.:—It was the clearly expressed intention of the testatrix that the residue of her estate should be applied by the particular trustees whom she appointed for the benefit of war widows like herself, and not for the benefit of any of the classes mentioned in sec. 4 of the Soldiers' Aid Commission Act.

The amendment of 1917 does not assist the appellants, whose claim to the funds is, in my opinion, absolutely devoid of merit.

I would dismiss the appeal.

FERGUSON, J.A., concurred.

Appeal dismissed without costs.

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[HODGINS, J. A.]

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✂
DWORKIN V. GLOBE INDEMNITY CO. OF CANADA.

Insurance (Burglary)—Absence of Written Application—Acceptance of Policy—Contract—Ontario Insurance Act, secs. 155 (1), 156 — Misleading Statements Made Orally by Assured—Suppression of Information—Materiality—Misstatements Acted upon by Insurance Company—Failure of Action upon Policy—Terms of Policy—Absence of Condition Relating to Avoidance for Untruth or as to Materiality—Sec. 156 (5), as Amended by 5 Geo. V. ch. 20, sec. 19.

The plaintiffs, through an insurance broker, their agent, applied to the defendants for insurance of business premises against burglary. No formal application was signed by the plaintiffs: see sec. 156 of the Ontario Insurance Act. An employee of the defendants inspected the premises and saw one of the plaintiffs, who answered some questions. The defendants issued a policy, and the plaintiffs (sec. 155 (1) of the Act) accepted it as their contract with the defendants:—

Held, upon conflicting evidence, that the plaintiffs concealed for their own purposes the facts that they had been insured against burglary by a policy issued by another company; that they had, immediately before their application to the defendants, suffered a substantial loss by burglary, practically exhausting that policy; that they knew the amount or probable amount of the loss when stating that they did not know it, and also when their agent said it was small; and that they made the statements they did for the purpose of inducing the defendants to issue the policy.

These were misleading statements, and involved the suppression of information which the plaintiffs were bound to give, and in both respects they had reference to a matter which was material to the risk. The defendants acted upon these misstatements and were misled by them. Upon this ground the plaintiffs' action upon the policy should be dismissed.

London Assurance v. Mansel (1879), 11 Ch. D. 363, and *Condogianis v. Guardian Assurance Co.*, [1921] 2 A.C. 125, followed.

Section 156, with the amendment of subsec. 5 made in 1916 by sec. 19 of the Statute Law Amendment Act, 5 Geo. V. ch. 20, requires that the statement shall be material and shall be expressed in the contract to be so. There was in the policy issued by the defendants no term or condition relating to avoidance for untruth or as to materiality, such as required by sec. 156. And so if the untruth of the statement in the policy and that it was material had been the only defence, the plaintiffs must have succeeded in the action.

Brock v. United States Fidelity and Guaranty Co. (1921), 20 O.W.N. 278, considered.

ACTION on a mercantile open stock burglary policy issued by the defendants in favour of the plaintiff firm, of 525 Dundas street west, Toronto, wholesale tobacco and cigar merchants. The policy was dated and countersigned on the 27th April, 1920, and was for \$6,000.

The action was tried by HODGINS, J.A., without a jury, at a Toronto sittings.

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OF CANADA.*F. J. Hughes*, for the plaintiffs.*R. H. Parmenter*, for the defendants.

October 26. HODGINS, J.A.:—The negotiations for insurance took place by telephone between one Ireland, an insurance agent, and Ferguson, manager of the defendants' burglary business in Ontario. After the telephone conversation, the defendants sent Brett, one of their employees, to inspect the plaintiffs' premises, and after his return, and acting upon his report, coupled with what Ireland had communicated, the policy in question was issued and sent to Ireland for the plaintiffs. The loss occurred on the night of the 18th or morning of the 19th May, 1920, and was discovered early on that morning. Counsel for the defendants admitted that a burglary, within the meaning of that word as used in the policy, occurred at the time stated, but asserted that the company were not liable by reason thereof. The loss is proved at \$4,230.27, and this amount, while not admitted, was not questioned in cross-examination.

On page 3 of the policy there appears what purports to be an application or declaration signed by the plaintiffs and witnessed by Ferguson, containing 16 items of information. No application in fact was ever signed, and Ferguson stated that he himself filled in an application-form so that a stenographer could copy it into the policy and that he signed the plaintiffs' name thereto, basing his information on what he had been told or learned from Ireland and Brett. He said it was the company's practice to do this instead of asking the applicant for insurance to sign a formal application. The result is that there is no formal application, and the plan of inserting a fictitious one in the form of a declaration in the policy is adopted, I suppose, to get rid of the provision regarding applications as found in sec. 156 * of the Ontario Insurance Act, R.S.O. 1914, ch. 183.

*156.—(1) Subject to the provisions of section 193 all the terms and conditions of the contract of insurance shall be set out in full on the face or back of the policy or by writing securely attached to it when issued, and unless so set out no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect shall be valid or admissible in evidence to the prejudice of the assured or beneficiary.

(2) Whether the contract does or does not provide for its renewal but it is renewed by a renewal receipt it shall be a sufficient compliance with subsection 1, if the terms and conditions of the contract were set out as provided by that subsection and the renewal receipt refers to the contract by its number or date.

(3) The proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract.

The facts as they appear in evidence are as follows. The plaintiffs had a policy against burglary in the Gresham Insurance Company for \$5,000, and suffered a loss of \$6,200. The policy was thereby exhausted. This burglary took place on the 25th April, 1920.

On the day after this burglary, spoken of throughout the trial as the first burglary, Edward Dworkin, one of the plaintiffs, telephoned to Ireland to arrange burglary insurance to the extent of \$6,000. Ireland's position, as stated by Edward Dworkin, was that he had acted as broker for the plaintiffs for 5 or 6 years in looking after their insurances, and was the person to whom Dworkin would naturally go when he wanted to place insurance. Ireland himself says that in his judgment he was in this matter the agent of the plaintiffs. I agree with him. See *Empress Assurance Corporation v. Bowring* (1904), 11 Comm. Cas. 107.

Ireland telephoned to Ferguson, not mentioning the fact of the first burglary, and asked him to send a representative to 525 Dundas street west, to inspect the property for burglary insurance, and, if satisfied, to issue a policy covering the risk for the amount requested: he says he was not asked if this was good business, and that it was "up to them," and not to the broker, to decide as to the insurance. He further says that on the next day or the second day afterwards Ferguson telephoned stating that they had inspected the risk, that it was satisfactory, and that they would cover it from the 27th April. Ireland then advised the plaintiffs by telephone that he had arranged the insurance with the defendants. Ireland was special agent for the Gresham Insurance Company, whose policy had been a total loss as already mentioned, but he did not tell that to Ferguson.

(5) No contract of insurance shall contain or have endorsed upon it, or be made subject to, any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is and is expressed to be limited to cases in which such statement is material to the contract, and no contract shall be avoided by reason of the inaccuracy of any such statement unless it is material to the contract.

(Subsection 5 is set out with the amendment made by 5 Geo. V. ch. 20, sec. 19).

(6) The question of materiality in any contract of insurance shall be a question of fact for the jury, or for the Court if there is no jury; and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity.

(7) Nothing in this section shall impair the effect of the provisions of sections 194 to 201.

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Ferguson said that he was called to the telephone by Ireland on the 27th April, and the risk was submitted to him; that Ireland said it was a good physical hazard; and that, in answer to a further question as to whether the plaintiffs had had a loss at the address given, Ireland said, "Yes, a small loss, but that the place had been strengthened with iron bars." He then sent Brett, an employee of the defendants, on the 28th April, to inspect the risk, and on his return, having obtained particulars from him, felt satisfied, and ordered the policy to be issued. He says there was no arrangement or agreement other than the policy, that he was not asked for a binder, and did not agree to cover the risk until after the inspection. It will be noted from the above that the real difference between Ireland's and Ferguson's statements is that, while Ireland says he gave no information about the Gresham policy being a total loss, and said nothing about a small loss, Ferguson says that he admitted a loss but said it was a small one. Both agree that the policy was to be issued if the risk was satisfactory; and, as the loss in this case occurred after the issue of the policy and the receipt of it by Ireland as agent for the plaintiffs, no question arises as to liability by reason of the telephone conversation as for oral insurance.

I have no doubt that the policy was issued in due course, and was received by Ireland far earlier than he is willing to admit. He thinks it did not reach his office till about the 17th May. But he fails to give any sensible reason for that impression, and no one is called from his office to strengthen his evidence. Ferguson, on the other hand, asserts that the policy was sent forward to Ireland at once on the 28th April. I am convinced that it was in Ireland's possession with the assent of the plaintiffs, and on their account, for such a reasonable time before the loss as would have enabled Ireland to examine it. Section 155, sub-sec. 1, * of the Ontario Insurance Act applies. If he had examined it, he would have found that the defendants had issued the policy upon the understanding stated in item 11 on page 3; and if he did not do so the plaintiffs cannot complain if it is found that they, through their agent, accepted the policy

*155.—(1) Where the subject-matter of a contract of insurance is property or an insurable interest in property within Ontario, or is a person domiciled or resident therein, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the assured, his assign or agent in Ontario, shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation in lawful money of Canada.

sued on herein as their contract with the defendants: *Provident Savings Life Assurance Society of New York v. Mowat* (1902), 32 Can. S.C.R. 147.

The two questions for decision are: (1) whether the defendants can avoid the insurance contract for misrepresentation; and (2), if not, whether the plaintiffs can succeed, having regard to the terms of the policy.

As to the first question the evidence is as follows:—

Brett visited the premises on the 28th April and saw Edward Dworkin, who said he had had a loss, but it was not very much, and he was just checking it up. Brett then asked him if he was covered by insurance, and, according to his testimony, Dworkin replied "no." On cross-examination he said that if Dworkin said that he mentioned previous insurance to him he would deny it. Dworkin was not recalled on this point in reply, but in his earlier cross-examination he said he could not remember whether he mentioned the name of the company he was insured in, but that he had said to Brett he was taking stock with the adjuster. I thought that perhaps the explanation of one difference between the evidence of Brett and Dworkin might lie in the use of the word "covered," and that, while Brett used it in the sense of being insured, Dworkin may have understood it to mean "fully protected having regard to the amount of the loss," but that point was quite cleared up in Brett's re-examination, when he said that Dworkin's statement to him was to the effect that he had no insurance at all.

Judkin, an employee of the plaintiffs, says he was present and heard what passed between Dworkin and Brett, and he professes to give the exact words used by the former. He says the question was as to the amount of the loss, and Dworkin said, "I don't know yet, I am taking stock with Whitehouse" (representing the insurance company). Brett denies that any one was present at his conversation with Dworkin.

Dworkin, in giving his account, says that he did not tell Brett about the burglary, but said that he had had a loss; and, while he knew that the loss was \$1,500 or \$2,000, he did not mention the amount to Brett, but told him that he was taking stock with an adjuster, and did not know how much the loss was, and that the adjuster was present during his conversation with Brett.

The adjuster, Whitehouse, was called as a witness, and he says he does not know Brett and heard no conversation between Edward Dworkin and any representative of the Globe Indemnity Company, in this agreeing with Brett.

On this conflict of evidence I have come to the conclusion that

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Edward Dworkin concealed for his own purposes the facts that he had been insured in the Gresham Insurance Company; that he had suffered a loss by burglary to a substantial amount, practically exhausting the policy; that he knew the amount or probable amount of the loss when stating that he did not know it, and also when his agent said it was small; and that he made the statements he did for the purpose of inducing the defendants to issue the policy in question. I have also come to the conclusion that these were misleading statements, and involved the suppression of information which he was bound to give, and that in both respects they had reference to a matter which was material to the risk: *London Assurance v. Mansel* (1879), 11 Ch. D. 363; *Condogianis v. Guardian Assurance Co.*, [1921] 2 A.C. 125. I further find that the defendants acted upon these statements and were misled by them.

The first burglary took place on the 25th April, and stock was taken on the same day immediately after the burglary, by Edward Dworkin and Whitehouse, the latter checking it over for the Gresham Insurance Company. On the following day Dworkin applied to Ireland, through whom he had insured in the Gresham Insurance Company, to procure him similar insurance. Ireland as his agent refrained from mentioning the loss which had just occurred under a policy which he had procured, or, according to Ferguson, minimised the effect of the loss without connecting it with any covering insurance. It is impossible to resist the conclusion that, with the first burglary so recent, the suppression of any reference to it and to the insurance against it, when applying for insurance against a similar loss, was deliberate. It indicated that what was concealed was material in some way to the insurers. It is much the same kind of information as was considered to be material in *Western Assurance Co. v. Harrison* (1903), 33 Can. S.C.R. 473, and, inferentially, in *Anglo-American Fire Insurance Co. v. Hendry* (1913), 48 Can. S.C.R. 577, 15 D.L.R. 832. Materiality has been well defined in England by the Marine Insurance Act, 1906, 6 Edw. VII. ch. 41, sec. 18, sub-sec. 2, as "every circumstance . . . which would influence the judgment of a prudent insurer in fixing the premium, or in determining whether he will take the risk." It seems pretty obvious that, had the fact that the plaintiffs were covered by insurance on the occasion of the first burglary been disclosed, inquiry would have been made as to why the carrying company would not continue the insurance. There is a further reason why the information is material, and that is, that, while a small loss might not indicate insecure premises or want of proper precautions, a large loss might do

so. It is a reasonable precaution, I think, for a company to take, to ascertain whether similar losses have occurred, whether the applicants were insured against loss, what the extent of the loss was in relation to the insurance, and why the insuring company was not asked to continue on the risk. The number of different kinds of goods that may be stolen make it reasonable that the company should know whether their insurance is intended to cover goods similar to those abstracted, and whether they were covered by prior insurance. The probability of another loss on particular goods should be important in estimating the risk to be run. All these considerations may affect the moral hazard and throw light on the physical hazard.

No attempt was made at the trial to dispute by evidence what was said by Mr. Wilson, Ontario representative of the defendants, as to the materiality of what was concealed as viewed in the insurance business.

On this branch of the case I must find that Ireland, in doing his part, concealed material facts from the defendants; that the plaintiff Edward Dworkin concealed material facts from Brett, the agent of the defendant company, and made untrue and misleading statements to him on material matters; that it was the common understanding of the parties that a policy should issue as evidence of the insurance contract, and that the policy now sued on did issue and is the only contract between the parties; and that, having been obtained under the circumstances I have mentioned, the defendants are entitled successfully to resist liability thereunder.

It is not necessary to discuss the second question, but if it were I do not think the case of *Brock v. United States Fidelity and Guaranty Co.* (1921), 20 O.W.N. 278, is sufficiently like this case on the facts to be applicable here. It is not mentioned in the report whether any term of the policy stated the materiality of the statement therein in conformity with the amendment in 1915 (by sec. 19 of the Statute Law Amendment Act, 5 Geo. V. ch. 20) of sec. 156, sub-sec. 5, of the Ontario Insurance Act. With that amendment the section now requires both materiality in fact and by convention to be shewn; that is, the statement must be material and must be expressed in the contract to be so. Materiality in fact without an admission of its importance in the contract, or agreement as to materiality without proof of the fact, does not afford any defence where a condition or term of the policy is relied on to avoid the policy. There is in this policy no term or condition relating to avoidance for untruth or as to materiality such as sec. 156 requires. If the untruth of the statement in the policy and that it was material was the only

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defence, I should be obliged to give judgment for the plaintiffs. I can see no reason for reformation, which is asked for by the defendants. But there still remains the defence based upon the untrue and material statements inducing the making of the contract and resulting in the issue of the policy of insurance, apart from that based upon its terms and conditions. See the cases cited in *Selick v. New York Life Insurance Co.* (1920), 48 O.L.R. 416, 57 D.L.R. 222; *Stebbing v. Liverpool and London and Globe Insurance Co.*, [1917] 2 K.B. 433; *Woodall v. Pearl Assurance Co.*, [1919] 1 K.B. 593; *Condogianis v. Guardian Assurance Co.* (ante).

The action will be dismissed with costs.

[APPELLATE DIVISION.]

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COSTANZA V. DOMINION CANNERS LIMITED.

Master and Servant—Injury to Health of Servants by Using Water from Well on Premises Supplied by Master—Duty of Master—Negligence—Evidence—Findings of Jury—"Accident"—Workmen's Compensation Act, 1914, 4 Geo. V. ch. 25, secs. 2 (a), 13, 15—Remedy—Action—Claim under Act—Jurisdiction of Workmen's Compensation Board.

Three of the plaintiffs, being the wife and infant children of the fourth plaintiff, were employed by the defendants and lived in a house and were supplied with drinking water from a well, owned by the defendants. They became ill of typhoid fever; and, in an action for damages for the injury, loss, and expense occasioned by their illness, the jury found that the illness was caused by the negligence of the defendants "in continuing to use the impure water from the well" and "in not providing a supply of wholesome drinking water;" also that the wife and children contracted the fever as a result of drinking water taken from the well:—

Held, that there was evidence to support the finding of negligence; and (MEREDITH, C.J.C.P., and LENNOX, J., dissenting) that the illness was not an "accident" within the meaning of sec. 15 of the Workmen's Compensation Act, 4 Geo. V. ch. 25, which takes away the right of action which a workman may have against his employer "for or by reason of any accident which happens to him while in the employment of such employer."

Scotland v. Canadian Cartridge Co. (1919), 59 Can. S.C.R. 471, applied and followed.

Per RIDDELL, J.:—Where there is no antecedent duty of one person toward another to perform any act for the latter's advantage, if the duty be undertaken gratuitously the further duty to perform it without negligence is implied.

Turner v. Merrylees (1892), 8 Times L.R. 695, referred to.

Per MEREDITH, C.J.C.P.:—The injury was an accident—"a fortuitous event occasioned by a physical or natural cause" (sec. 2 (a) of the Act): by accident the water became contaminated, and by accident the plaintiffs drank the germs which caused their injury. The "accident" arose out of and in the course of the plaintiffs' employment, and the action should be dismissed: sec. 13 of the Act.

Per LENNOX, J.:—The claims of the plaintiffs were within the exclusive jurisdiction of the Workmen's Compensation Board. *Innes or Grant v. Kynoch*, [1919] A.C. 765, and *Brintons Limited v. Turvey*, [1905] A.C. 230, were directly in point and should be followed.

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ACTION by Horace Costanza, his wife, and two infant children (suing by him as next friend), to recover damages for injury to the health of the wife and children and consequent loss and expense incurred by the plaintiff Horace Costanza, by reason, as the plaintiffs alleged, of the insanitary condition of a tenement owned by the defendants in which the wife and children were housed.

The wife and children were employed by the defendants in their factory at Jordan Station, and, at the invitation of the defendants, as the plaintiffs alleged, took up their abode in the tenement, which was maintained for the defendants' employees, and adjoined and was used in connection with the factory. The specific allegation of the plaintiffs was that a certain well upon the premises was the only source of supply of water for drinking, and that they, drinking the water, which was impure, contracted typhoid fever, and suffered the injury and loss complained of.

The action was tried by ROSE, J., and a jury, at Hamilton.

Questions were left to the jury, which they answered as follows:—

1. Was the illness of the plaintiffs Mary Costanza, Phillipine Costanza, and Horace Costanza the younger, caused by the negligence of the defendants? A. Yes.
2. If so, in what did such negligence consist? A. (a) In continuing to use the impure water from the well. (b) In not providing a supply of wholesome drinking water.
3. Could the said plaintiffs, or could any of them, and if so which, have avoided the illness by the exercise of reasonable care? A. No.
4. If so, in what did their negligence, or the negligence of such of them as were negligent, consist?
5. Was the well in question in this action injurious or dangerous to the health during the months of June and July, 1920? A. Yes.
6. Did the plaintiffs Mary Costanza, Phillipine Costanza, and Horace Costanza the younger, or did any of them, and if so which, contract typhoid fever as a result of drinking water taken from such well? A. Yes, all of them.
7. Did the defendants, in the months of June and July, 1920, provide for the employees at their Jordan Station plant a sufficient supply of wholesome drinking water? A. No.

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8. If not, did the plaintiffs Mary Costanza, Phillipine Costanza, and Horace Costanza the younger, or did any of them, and if so which, contract typhoid fever as a result of the defendants' failure to provide such supply? A. Yes, all of them.

9. What damage was caused to the plaintiff Horace Costanza by the illness of his wife, daughter, and son? A. Loss of time from work, and additional expense such as doctors' fees, hospital charges, medicine, special food, ice, and laundry, amount \$800.

10. What damage was caused to:—

(a) Mary Costanza by her illness? A. Loss of time from work, amount \$200.

(b) To Phillipine Costanza by her illness? A. Loss of time from work and injury to health and hearing, amount \$2,000.

(c) To Horace Costanza the younger by his illness? A. Loss of time from work, amount \$200.

The trial Judge directed that judgment should be entered for the plaintiffs in accordance with the jury's findings, with costs.

The defendants appealed from the judgment of ROSE, J.

September 22 and 23. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

George Lynch-Staunton, K.C., and T. Hobson, K.C., for the appellants, argued upon the facts and evidence that they were not guilty of negligence, as they took every reasonable precaution for testing the purity of the water supplied to their employees; hence there was no common law liability; also that this case did not come within the Public Health Act, R.S.O. 1914, ch. 229, secs. 41 and 43: if the defendants had supplied no water at all, they might have come within the Act, but the Act did not make them insurers. The plaintiffs' remedy, if any, was under the Workmen's Compensation Act, 4 Geo. V. ch. 25, sec. 15. * *Scotland v. Canadian Cartridge Co. (1919)*, 59 Can. S.C.R. 471, was a different case: it was a case of chemical poisoning, and this is a case of germ poisoning; and in that case there was an adverse decision by the Workmen's Compensation Board, and here there was no such decision.

*15. The right to compensation provided for by this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of such workman for or by reason of any accident which happens to him while in the employment of such employer, and after the day named by proclamation as mentioned in section 3, and no action in respect thereof shall thereafter lie.

Peter White, K.C., and J. S. Duggan, for the plaintiffs, respondents, contended that the jury had properly, upon the evidence, found the appellants negligent at common law, and that the case went to the jury (1) under the common law, (2) under the Factories Act, (3) under the Public Health Act, for maintaining a nuisance. They also urged that the law was conclusive in the respondents' favour, citing *Scotland v. Canadian Cart-ridge Co.* (*supra*), and *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, *per* Riddell, J., at pp. 506-508.

Lynch-Staunton, K.C., in reply, referred shortly to the evidence.

November 4. RIDDELL, J.:—This appeal by the defendants was argued at considerable length and with great ability and fairness on either side—its importance justifies the time and labour expended upon it.

In the view which I take of the case, however, some of the argument becomes unimportant—the case seems to me to depend and it may be decided upon common law principles.

In the first place: even where there is no antecedent duty of one person toward another to perform any act for the latter's advantage, if the duty be undertaken even gratuitously the further duty is implied to perform it without negligence—a recent case is *Turner v. Merrylees* (1892), 8 Times L.R. 695.

It may not be the duty of a railway company to have a platform upon which its passengers may alight, or a sidewalk to and from their stations, but if a company provides either it must be reasonably safe for use.

Leaving aside any statutory duty under the Factories Act, and disregarding the duty owed by master to servant arising out of their relationship—as to which see Beven on Negligence, 2nd ed., pp. 609 *sqq.*—it seems to me that here the defendants undertook—gratuitously if you will—to supply the plaintiffs with drinking water. It then became the defendants' duty to use due care to supply pure drinking water. I think that they did not use such care. The evidence of Dr. Nasmith is that he advised them to discontinue the well—there is much to corroborate that, and the jury have believed it. Even if we take the formal report of Dr. Nasmith, we find that the defendants did not use the precautions which he recommended if they should continue to use the well. What would have been the result if they had used such precautions is most conjectural, and we need not, I think, enter into the inquiry.

That the plaintiffs were supplied with impure water is, I

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think, beyond question; and I am of the opinion that there is ample evidence to support the finding of negligence.

This water, the jury say, and I agree with them, caused the sickness of the plaintiffs—there are no such elements of doubt as appear in the cases cited in *Beal v. Michigan Central R.R. Co.*, 19 O.L.R. 502.

It remains to consider the effect of the Workmen's Compensation Act (1914), 4 Geo. V. ch. 25, sec. 15. This section takes away the right of a workman to sue his employer as at the common law in every case of a right of action "for or by reason of any accident which happens . . . in the employment of such employer . . . " However this case would have stood without *Scotland v. Canadian Cartridge Co.*, 59 Can. S.C.R. 471, I am of opinion that that case, when fairly read, concludes us to hold that the sickness here was not an "accident" within the meaning of the Act.

I would dismiss the appeal.

LATCHFORD, J.:—The grounds upon which this appeal was argued are: (1) that there was no evidence of negligence on the part of the defendants proper to be submitted to the jury; (2) that there was no evidence that the water found by the jury to have caused disease to Mrs. Costanza and two of her children was infected by typhoid germs at any time; (3) that the remedy of these plaintiffs, if any, was to have applied to the Workmen's Compensation Board, and, not having so applied, their action is barred; and (4) that in any event the damages to Horace Costanza senior are not recoverable.

Other grounds set forth in the notice of appeal are that there was misdirection by the learned trial Judge, and that he admitted evidence which should have been excluded; but no argument was addressed to the Court based on these grounds, and a careful perusal of the whole evidence and the charge to the jury satisfies me that there was no misdirection and no improper admission of evidence which could have affected the decision of the jury.

The finding that the illness of Mary, Phillipine, and Horace Costanza was caused by the negligence of the defendants in continuing to use—that is, providing for such plaintiffs' use—impure drinking water, is, in my opinion, amply warranted by the evidence.

It was also a duty owed by the defendants to these plaintiffs, under the Public Health Act, to provide them with a supply of wholesome drinking water; and that duty they plainly failed to discharge.

In 1918, 1919, and 1920, there were outbreaks of typhoid fever among the defendants' employees taking their drinking water from the only source supplied to them. The defendants' manager, Mr. Gunn, swears that he was unaware of the outbreak of 1918, although four of the working people were ill and at least one died. The local health officer, Dr. Addy, a witness called by the defendants, entertained no doubt that the disease which broke out in 1918 among the users of the well-water was typhoid. He deposes, thus directly contradicting Mr. Gunn, that in 1918 Gunn was aware that some of the employees had typhoid; that he discussed the matter with Gunn in 1918, as in 1919 and 1920. Dr. Addy suspected the well as the source of the disease in 1918, as in the following years, and had a single sample of the water sent to the Provincial Board of Health to be tested. On receiving their report on the test, which was doubtless negative, he allowed the use of the well to be continued. Mr. Gunn positively denied the statement of Mrs. Scharino that, when she complained to him about the water, he and Mr. Audd, his assistant, lifted the whole pump—Miss Mangano calls it the cover—and that they saw tomato-skins and peach-skins floating on the water—a plain indication that there was a defect in the factory sewers which allowed drainage to enter the well.

When operations began in June of 1919, no water was obtainable for drinking purposes. Mr. Gunn had had the handle taken off the pump over the well so that the water could not be used. A second sample of the water had been taken by the defendants and sent to their chemist at Brighton, who reported on the 1st July that his results shewed the water to be "sanitary at the present time," adding: "This does not mean that it may always be healthful unless it is free from all sources of possible contamination." On receiving this report, the defendants replaced the handle, and thus provided means of obtaining drinking water for their operatives.

In about two weeks, the usual period after infection, a frightful outbreak of typhoid occurred—what is called an explosive epidemic. From 16 to 20 of the 50 to 80 employees using the water were stricken with the disease, or about the full percentage liable upon the evidence out of a hundred partaking of food or water tainted by typhoid bacteria.

Dr. Addy sent a sample of the water from the defendants' well to the laboratories of the Provincial Board of Health, and the experts at the laboratories reported to him on the 14th August that colon bacilli were present in one cubic centimeter of the water, at the same time warning him that water from

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the source of supply may shew variations at different sampling points and also vary from time to time at the same point. "Favourable reports from a limited number of samples were not," he was told, "to be interpreted as indicating that water from the supply is *always* of good quality and that contamination may be intermittent and *highly dangerous at times*. The laboratory report should always be considered in conjunction with the sanitary survey and epidemiological evidence."

Under the heading "Remarks" the report adds:—

"This specimen shews the presence of bacteria of intestinal origin. In arriving at a conclusion as to the origin of typhoid, other possible source of infection, such as direct contact, carriers, flies, and food, should also be considered."

Dr. Addy took the report to Mr. Gunn and shewed it to him. The manager of the factory then knew, as Dr. Addy knew, that bacteria of intestinal origin were present in the well-water which his employees had been using. Dr. Addy may have told him, as the fact was, that the germs of typhoid had not been detected in the water. Their detection in water, according to the evidence, is a matter of great difficulty. Colon bacilli which occur in the same loci are now recognised with comparative ease, and their presence in large numbers is regarded as indicating that the typhoid bacteria are probably present. When, as in this case, an epidemic has broken out among the persons using the water containing organisms of intestinal origin, and a survey of the sanitary or insanitary conditions surrounding the infected source shew means of faecal infection, and when, moreover, other possible sources are excluded, the inference which a reasonable man could, and in my opinion should, draw is that the water containing in quantity the colon bacillus and used by all the persons afflicted by the fever contained also the germs of typhoid.

Throughout his evidence, Dr. Addy appears to manifest a strong bias in favour of the defendants. He swears that, as the report did not shew "positively," a word which in this connection he uses more than once, that the suspected and intestinally contaminated water was the cause of the epidemic, he advised Mr. Gunn that it might be used. Pressed by Mr. White on cross-examination, Dr. Addy admitted with manifest reluctance that the bacteria mentioned in the report were of human origin.

"Q. So that the almost irresistible conclusion (is) that these intestinal bacilli found in there were of human origin is it not?
A. It seems to be the only way I can get out of it is to say it is that."

Afterwards he said, "I cannot tell what origin it" (the colon bacillus found in the water) "is; it may be human."

Then Mr. White: "I will ask you again, is not one driven irresistibly to the conclusion that these bacilli found in this water were of human origin, please answer? A. I cannot answer it either in the negative or affirmative.

"Q. Is that not a reasonable conclusion? A. That is a reasonable conclusion."

Apart from a privy-pit not far away, sewers from at least one flush-closet passed close to the well. According to one diagram in evidence, sewers surrounded the well. The means of human excretal infection of the well were present, according to the defendants' own witnesses.

Dr. McClenaghan, the district health officer, who visited the premises with Dr. Addy after the outbreak of 1919, says he found the sanitary conditions very bad. He says that the well from which the drinking water for all the employees was obtained could not help being polluted. He considered that the well was polluted, and that the water for the factory used in the processes of canning was from a still worse source.

After admitting on cross-examination that there were many cases of typhoid—16 or 20 in 1919—among persons using the polluted well, Dr. McClenaghan was asked if the fact did not very strongly point to the well as the source of contamination, and answered, "I will not go that far with you." Thus in 1919 the defendants were aware that the water was infected by bacteria of intestinal origin, of possibilities and probabilities of faecal infection of the well, and of an epidemic among those who were supplied with the water.

Dr. McClenaghan recommended the installation of a septic tank for the waste and sewage from the factory, and that a sanitary engineer should be consulted with a view to the prevention of other epidemics.

As recommended by the district health officer, a distinguished and experienced sanitary engineer, Dr. George G. Nasmith of Toronto, was brought over to Jordan early in 1920. While his statement that he recommended a new well is denied by Mr. Gunn, it is corroborated by Dr. Addy, and might well be believed by the jury. The denial seems based on the fact that such a recommendation does not appear on the face of the report made by Dr. Nasmith's firm to the defendants on the 26th April, 1920, where the statement is merely: "We understand you contemplate constructing a new well; if so, it should be constructed as far away as possible from the existing buildings."

Dr. Nasmith found the problem he had to deal with at Jordan

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was that of a defective water-supply from two sources—the well and a pond from which water was pumped to two overhead tanks in close proximity to the well. His firm reported as to the well: “There seems little doubt but that the well has been contaminated from the overflow and leakage coming from the overhead tanks, from lack of proper drainage in the neighbourhood of the well, and from insufficient protection to the well itself.” His advice was that every precaution should be taken properly to drain the neighbourhood around the existing well, which he stated to be “in a very undesirable location, such that, even with precautions which were recommended to be taken, one would always feel suspicious about its surroundings, due to its close proximity to the buildings and to seepage from the inside of the buildings.”

It was further recommended that several tests of the water from both wells—the old and the new—should be made at the same time, and, should the water from the new well prove the better, the old well should be abandoned for all purposes. If the new well was built immediately, and on being tested was found satisfactory, then the improvements suggested in the old well need not be carried out.

The necessity for frequent tests had been brought to the notice of the defendants by the Provincial Laboratory in the previous year.

Some of the recommendations of Dr. Nasmith were carried out in June. The stone sides of the well were removed for a distance of 5 feet and replaced by concrete, and a covering of the same material placed over and around the well. A new well was sunk, but whether before or after another outbreak of typhoid does not appear.

It is important to note that, notwithstanding the warning of the Provincial Laboratory given in 1919, the knowledge on the part of the defendants that the well was polluted in that year, and that there had been an explosive epidemic among the employees using the water from the source infected by intestinal organisms, and the recommendation of Dr. Nasmith that several tests should be made of the well-water, no test whatever was made of it in 1920 until after a third epidemic of typhoid had broken out among the factory operatives and the bricklayers and their labourers engaged in erecting a new building. The canning season in that year began on the 29th June. Within two or three weeks, three of the plaintiffs and many others among those using the well were stricken. Five out of the six bricklayers took the disease, and one of them, the foreman, died. Four out of the six labourers who drank the water also took typhoid. All the brick-

layers lived at St. Catharines and returned to their homes every night. There was no typhoid case in the family of any of them.

On the 15th July, Mr. Gunn again removed the handle from the pump. Some cases of typhoid developed later, but none after the expiry of the period during which ordinarily the disease manifests itself.

Dr. Addy was asked: "When the people stopped drinking from the well the typhoid epidemic ceased, did it not?"
A. There were cases after.

"Q. But very shortly after, which might have been attributable to inoculation before the well was closed? A. I think that is right."

Dr. Anderson, the bacteriologist of the Provincial Board of Health, went from Toronto to investigate the cause of the epidemic, arriving at the defendants' premises on the 23rd July. Ten persons were there found ill of typhoid, and all had been working in the defendants' factory. Dr. Anderson tested the well-water and found it highly contaminated with intestinal organisms. He investigated the possibilities of infection from other sources and eliminated them as causes of the outbreak. His diagram made from information given him by Mr. Gunn shews drains or sewers passing near the well. A flush-closet used late in June, according to one witness, which stood near the well, though inside a building, had been removed before Dr. Anderson's arrival. The reason for its removal does not clearly appear in evidence, but may readily be inferred.

The finding of negligence may be supported on the ground that in the circumstances it was the duty of the defendants to have the water from the well tested several times in 1920 before supplying it to their employees. The defendants failed to discharge that and other duties, such as preventing, earlier in the season, the use of the adjacent closet or taking up the sewers near the well.

That such negligence caused the damages awarded to the plaintiffs is a probable and reasonable conclusion from the facts disclosed in the evidence.

In *Richard Evans & Co. Limited v. Astley*, [1911] A.C. 674, 678, Lord Chancellor Loreburn says:—

"It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then

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there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities."

It is strongly urged that, even if there was, as I think, a common law liability for breach of a duty owed by the masters to their servants, the defendants are relieved owing to the provisions of the Workmen's Compensation Act.

That contention must prevail if the disease which affected three of the plaintiffs falls within the meaning of "accident," as that term occurs in the statute.

It is there declared, sec. 2 (1), to include "a fortuitous event occasioned by a physical or natural cause." This appears to me not to affect the meaning of the word in the circumstances of the present case. I do not regard the outbreak of typhoid as fortuitous, that is, by chance. It was inevitable that every person who used the water while it was contaminated should be infected by it, though many could and did successfully resist the infection. The incidence of the disease could have been prevented by the defendants, and should have been expected by them. It had not the requisites of an accident in the popular and ordinary sense in which the term is used—"an unlooked-for mishap or an untoward event which is not expected or designed," as stated by Lord Macnaghten in *Fenton v. Thorley & Co. Limited*, [1903] A.C. 443, 448.

The difficulty of defining, as used in a statute, such a general term as *accident*, has often been referred to. In *Scotland v. Canadian Cartridge Co.*, 59 Can. S.C.R. 471, 507, Anglin, J., says that it had been more discussed than any other word, and that it means "some unexpected event happening without design and the time of which can be fixed."

In that case as in this, the time of the event could not be fixed, and it was held by the Supreme Court that injury to the health of a workman resulting from inhaling poisonous fumes was not an accident within the meaning of that term in the section of the Workmen's Compensation Act now relied on as a bar. The only difference between the *Scotland* case and this case is that the claim of the injured workman had been rejected by the Workmen's Compensation Board; but that rejection cannot have affected the meaning proper to be given by the Court to the word "accident."

Referring to the leading recent case of *Innes or Grant v. Kynoch*, [1919] A.C. 765, the Chief Justice said (59 Can. S.C.R. at p. 474):—

"I take it from reading the judgments delivered that in the absence of proof of the abrasion on the plaintiff's leg which

became infected by certain noxious bacilli, there would not have been any ground for the holding their Lordships reached."

In the case followed in *Innes or Grant v. Kynoch—Brintons Limited v. Turvey*, [1905] A.C. 230—the House of Lords held, Lord Robertson dissenting, that the assault of a bacillus upon a workman proceeding from the wool upon which he was working, and affecting him with mortal anthrax, was an accident, and that the consequent and fatal disease was an injury. Lord Lindley, who agreed with the Lord Chancellor and Lord Macnaghten, was however careful to observe (pp. 237, 238): "I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act." Then he adds: "In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental."

Scotland v. Canadian Cartridge Co., decided after the *Innes* case, covers, in my opinion, the precise point raised here and is conclusive upon the defence raised by it.

The damages sustained by Horace Costanza flow directly from the negligence of the defendants. There is evidence to justify the amount awarded, and the appeal against him, as against the other plaintiffs, should be dismissed.

MIDDLETON, J.:—I agree with the views of my brothers and need add nothing.

There was a breach of the common law duty owing to the plaintiffs when the defendants negligently supplied them with impure water for drinking purposes, and it is abundantly shewn that the illness which occurred was the result.

There was not an "accident" within the meaning of the Workmen's Compensation Act, as expounded by the Supreme Court of Canada in the *Scotland* case.

MEREDITH, C.J.C.P.:—If the injury which the plaintiffs sustained, and for which damages are sought in this action, were caused by accident, and if the accident arose out of and in the course of the plaintiffs' employment, this action must be dismissed—the law of this Province plainly so provides: the Workmen's Compensation Act, sec. 13*.

*13. No action shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board.

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That the accident arose out of and in the course of the employment—if it arose at all—is manifest: the plaintiffs' action is based, and can be supported only, on the ground that the injury was sustained whilst the plaintiffs were engaged in their work for the defendants, their masters, in drinking water which the defendants were by law bound to provide for their servants to be so drunk.

And as plainly too—so it seems to me—the injury was an accident: “a fortuitous event occasioned by a physical or natural cause:” same enactment, sec. 2(a). Indeed it was accidental in a double sense: by accident the water became contaminated; and by accident the plaintiffs drank the germs which caused their injury; neither was in any sense intentional.

How the water became contaminated—if it were—has not been proved. If obliged to conjecture, my guess should be that it was caused by servants of the defendants making use of dis-used privies, and other places, instead of the water-closets which were in use. But, from whatsoever source the pollution came, there was no intention that it should pass into the well; that, if it happened, was accidental. There was no intention to drink the poison of such a pollution. Taking poison instead of pure water was altogether accidental. It is difficult for me to perceive how anything else could be more accidental, how it can reasonably be said that, in any sense, the plaintiffs' injury was not the result of an accident.

If poison of any other kind were taken in mistake for medicine, could it be said that the injury caused was not caused by accident? And it can make no difference whether the poison was mineral or vegetable, bacterial or microbial.

But it is said that the case of *Scotland* prevents us from giving effect to the obvious. There are two answers to that: first, that it was a very different case; and, second, that, as the question of accident or no accident was not open to the Courts in that case, there could be no decision upon the question; and we cannot avoid the duty to determine it now, in this case, no matter what may have been said upon the subject by any Judge of any of the Courts in which that case was considered.

In that case there was no poisoning of water by accident; all that was done to the water was done knowingly and intentionally, and there was no inhaling of the fumes by accident; if, as the jury found, the inhaling was detrimental to health, it was a detriment incidental to the work which was being done; and so an industrial or occupational cause of ill-health of which every person engaged in it knowingly took the risk. The fumes were inseparable from the work which had to be done; just as other

diseases are more or less inseparable from some other occupations, as every one knows, and, knowing, every one engaged in them takes the risk, unless and until statute-law intervenes, as it does to some extent under the Workmen's Compensation Act.

Instead of the cases standing in the way of a workman having compensation under the Act for injuries such as those in question, all the cases, of the very highest authority, make it very plain that the workman is entitled to such compensation.

I find it impossible to perceive any kind of difference in principle between those cases and this. That in one the microbes entered through an abrasion of the skin, can surely make only this difference, that they were of that kind which are not able to penetrate a sound human epidermis, and so if there had been no door opened to them in the abrasion there could have been no entry and no injury and no claim. It could make no difference in the effect, bodily or legally, whether the abrasion was caused intentionally or accidentally. In this case the germs were able to penetrate the lining of the alimentary canal, they needed no opening in it to let them in, and so the case is comparable to one in which by accident many minute poisoned needles had been swallowed in food or drink. If a man should run into a hornets' nest unintentionally and be stung to death, could it be less an accidental death only because they stung through the whole skin and not through any accidental break in it: and is there any difference in the case of a nest of microbes: or whether they penetrate the outward natural covering of the body or the inward lining of the alimentary canal?

Mr. White suggested that we might in effect refer it to the Workmen's Compensation Board to determine this question: but why should the question be sent there for consideration? The plaintiffs might have made their claim there, as the plaintiff did in the case of *Scotland*; but they chose to bring this action, and the defendants have a right to have it dismissed if this Court be of opinion that it does not lie, notwithstanding the fact that they might have applied to the Board to determine it—sec. 64 (4): and it is better that a question of such general importance should be determined by the highest Courts than by the Board, which shall have the benefit of that determination; a determination which would also be binding upon the parties, who, in bringing the action to trial, have sought such a determination rather than one by the Board.

I am in favour, therefore, of allowing this appeal and dismissing the action.

The case of each of the three plaintiffs who were poisoned

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and suffered stands in the same position and should be dealt with in the same manner.

The action of the fourth claimant—the husband and father of the others—is different. Though he was a fellow-servant of the defendants in a common employment with them, by chance the water he drank was uncontaminated, or his alimentary canal was impregnable, or his body contained enemies of the poisons in the water, enemies which were too much for them, or perchance in some other way he escaped. His claim is for money spent and time devoted to the other three in and during their illness: but such care and costs—even if otherwise recoverable—are among those things for which compensation is given under the provisions of the Act; and they are not to be paid for twice: this plaintiff's claim, if he really have any, is against those for whom he served and paid; and who are to be compensated for such things. His action therefore should be dismissed also.

LENNOX, J.:—I agree with the learned Chief Justice presiding in this Court that the Courts of this Province have no jurisdiction to entertain the claim set up in this action by and on behalf of Mary Costanza, Phillipine Costanza, her daughter, and Horace Costanza the younger, her son. The allegation of these plaintiffs is that, while working in the defendants' factory, as their employees, and in the course of their employment, they were supplied by the defendants with drinking water impregnated with typhoid germs; that these plaintiffs drank of this water without knowledge of its noxious and disease-bearing character, from time to time, and, in consequence, severally contracted an illness or disease described in the statement of claim as "gastro-enteritis or para-typhoid fever."

I do not know whether the other plaintiff—Horace Costanza—who sues on his own behalf for incidental damages as the husband of Mary and father of Phillipine and Horace junior, and also as next friend of his son and daughter, was also an employee of the defendants. I think he was. In answer to the question (9), "What damage was caused to the plaintiff Horace Costanza by the illness of his wife, daughter, and son?" the jury said: "Loss of time from work, and additional expense such as doctors' fees, hospital charges, medicine, special food, ice, and laundry. Amount \$800." And he has judgment for this sum.

Whether the plaintiff Horace Costanza happened to be a workman of the defendants or not, his right, if any he has, against the defendants, is not for compensation for "personal injury by accident arising out of and in the course of (his) employment," referred to in sec. 3 of the Workmen's Compen-

sation Act, 4 Geo. V. ch. 25, Ontario. I have therefore advisedly limited what I have said, and desire to be understood as limiting what I shall say, as to jurisdiction, to the other three plaintiffs alone. Assuming that I am right in concluding, as I do, that the three workers claiming for personal injuries can obtain compensation only through the Board, it would be a rather unlooked for result if a supplementary or collateral common law action could also be maintained by this plaintiff; but, as I am in a minority in any case, it is not advisable, I think, to lengthen my judgment, liable to be too long in any event, by adverting to this matter beyond clearly defining what I propose to deal with. It was not suggested by Mr. White that this plaintiff's claim has a better footing than the others. I notice, too, that a dwelling house, said to have been furnished as the plaintiffs' habitation, by the defendants, is referred to in the statement of claim as being in an insanitary condition. The issue at the trial probably drifted away from this question, as the jury was not asked to pronounce upon it; and, as it was not referred to upon the argument of the appeal, I have not considered whether these facts, if established, would determine anything as to the proper method of trial. Here again an outsider, the husband and father, as head of the family, must be taken to be the tenant and occupant. Our Workmen's Compensation Act is, no doubt, largely based upon the provisions of the English Workmen's Compensation Act of 1906; but, as to whether there is a radical difference in the scheme or policy of the Acts, I speak with hesitation, as I have not had the advantage of seeing any judicial reference to this point. It has not been and cannot be disputed that the defendants are carrying on an "industry" to which Part I. of the Act applies, and are contributors, and bound to contribute, to the "accident fund" as therein defined. Carefully reading and comparing these two Acts, I have come to the conclusion that, "where in any employment to which this Part" (Part I.) "applies, personal injury by accident arising out of and in the course of his employment is . . . caused to a workman," the only remedy of the workman or his dependents is under Part I., and through the agency of the Workmen's Compensation Board; and this whether the injury was caused "by accident," in the ordinary sense of that term, and as it is used in the English Act, or by "a wilful and intentional act" of the employer.

If this interpretation is right, it follows that the jurisdiction of the Board under the Ontario Act is much wider than the jurisdiction of the arbitrators under the English Act.

Under subsec. 2 (b) of sec. 1 of the English Act, "When

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the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible," the person injured may, at his option, either obtain compensation or redress by an action or by proceedings under the Act. It is not so here. The policy of our Act is in a large measure to do away with litigation between employee and employer; and to substitute the Board for the Courts, and a scheduled scale of compensation or amends for the uncertain estimate of a jury; and to this end it directs that "no action shall lie for the recovery of the compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board:" sec. 13. Using the words "by accident" in sec. 3, it was obviously necessary, if a check were to be put upon litigation, on the one hand, and, if the workman was not to be left entirely to the tender mercy of his employer, on the other, to do something more. The course adopted was to declare that "in this Act 'accident' shall include a wilful and intentional act, not being the act of the workman and a fortuitous event occasioned by a physical or natural cause:" sec. 2 (1) (a).

There is at least one other important distinction to be kept in mind in reading English cases decided before the judgment of the House of Lords in *Innes or Grant v. Kynoch*, [1919] A.C. 765, namely, the difference in the statutory requirements as to notice. Under our Act, "The notice shall give the name and address of the workman and it shall be sufficient if it states in ordinary language the cause of the injury and *where* the accident happened:" sec. 20, sub-sec. 2. Under the English Act of 1906 (and it was the same in the Act of 1897), the notice "shall give the name and address of the person injured, and *shall* state in ordinary language the cause of the injury and the date at which the accident happened:" sec. 2 (2).

Notwithstanding the exceptions and saving provisions in both Acts, the difference between "where" and "when" is important, in itself: that is, the necessity of stating a specific date, if literally construed, made it impossible to institute proceedings under the English Act in many instances where ascertainment of the actual time of the happening of the accident could not, in the end, be accomplished; in other words, where evidence of more than an approximate date was out of the question. It might be said that, the form of the notice to be given in this Province being so radically different, English decisions turning upon this point are not relevant. And this is quite true as regards the character of notice to be given in this Province, and it is also true that the interpretation of the English Act

as to notice, and, consequently, in a measure at least, the meaning of the phrase "by accident," was put upon a new footing in April, 1919, by the judgment of the House of Lords in the *Innes or Grant v. Kynoch* case, in which it was declared that "the provisions of the Act as to fixing the date of the accident are satisfied if, having regard to the nature of the injury alleged, the date of the occurrence of the accident is reasonably fixed, so as to connect the injury with the accident."

As to the notice itself we are not likely to have much difficulty; but, assuming, as I think I must, that when our Act was passed in 1914 the Legislature had in mind the interpretation in the English Courts of an Act which we in part adopted and in part amended, I find it necessary to consider some of these decisions in ascertaining, if I can, the legislative purpose and intent where terms of the basic Act have been significantly departed from. What I have in view is the inquiry: Does the form of the notice, read in the light of decided cases, and in connection with the interpretation clause, and secs. 13 and 60 of our Act, point to a limitation of the jurisdiction of our Courts far beyond anything contemplated or provided for by the English Act? I think it does. It was successfully argued in a long line of cases decided in England before 1914 that the requirement as to notice was a key to the interpretation of the Act, and that where, upon the facts, an exact date could not be assigned and established, that, in itself was proof that the injury was not "by accident."

It is sufficient to refer to two cases. *Steel v. Cammell Laird & Co. Limited*, [1905] 2 K.B. 232, is, perhaps, the most significant. The head-note is: "Held, that to bring a case within the Act there must be, by reason of sec. 2, sub-sec. 1, an injury by an accident of which notice can be given, and that, since it was not possible to indicate a time at which there was an accident which caused the injury to the workman, he was not entitled to an award under the Act." Collins, M.R., in that case, at p. 236, said: "It is not possible to indicate any precise time at which the mischief arose. It seems to me that the provisions of sec. 2 of the Act" (1897) "shew that what is dealt with are cases in which a date can be fixed as that on which the injury by accident came about. I am unable to find such a date in this case."

In *Eke v. Hart-Dyke*, [1910] 2 K.B. 677 (C.A.), the deceased died of ptomaine poisoning occasioned by inhaling sewer gas. He was exposed to this while opening cesspools; pursuant to his employers' instructions, and the period of exposure did not cover, in all, more than 4 or 5 days. There appears to have been

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evidence, regarded as satisfactory, that on one or other of these days, while so engaged, he became infected with the poison of which he died. Referring to *Brintons Limited v. Turvey*, [1905] A.C. 230, Kennedy, L.J., at p. 688, said: "According to the judgment of the House of Lords, if you can prove that on a particular day, though nobody saw it, a particular bacterium from the wool struck his eye, because his eye" (the workman's in the *Brintons* case) "was afterwards found to be diseased, that is an accident. It is not easy, I think, to draw a clear line of distinction between that and what might, I think, have been found here, on the medical evidence, that the death was due to toxin poisoning which got into his body on one or other of the particular occasions on which the deceased worked in the cess-pools." However, it being impossible to ascertain on which of the 4 or 5 days the sewer gas was taken into the system of the deceased, it was held that the injury was not "by accident" within the meaning of the Act.

It is common knowledge that our Act was framed by as eminent a jurist as we have in Canada, and it goes without saying that undoubtedly he supplemented his already extensive general knowledge of English case-law by special study and consideration of decisions under the English Acts. I do not suggest that Courts are completely bereft of jurisdiction, but I confess I find it easier to perceive the almost unlimited field of jurisdiction conferred upon the Board exclusively and finally to adjust difficulties arising between workmen and employers, in cases of mishaps, than to discover in advance the limited area reserved for the jurisdiction of the Courts. I am for the present not concerned as to the residue; it is enough if I am satisfied, as I am, even without the aid of conclusive decisions presently to be referred to, that the jurisdiction of the Board includes the issues to be determined in this instance.

How then does the matter stand, reading the Act in the light of the surrounding circumstances, and, for the moment, without reference to any subsequent decision?

1. The injury must be by accident, of course, but an accident, in the ordinary sense, plus the statutory meaning assigned to it: sec. 3 (1) and sec. 2 (1) (a).

2. Unless the contrary is shewn, it is to be presumed that an "accident arising out of the employment" occurred "in the course of the employment," and *vice versa*: sec. 3 (2).

3. The Act provides for the appointment of three Commissioners with a tenure of office the same as a County Court Judge, with salaries exceeding the salaries of the Supreme Court Judges of the Provinces at the date of the Act, and with power

to appoint a staff of officials at their discretion, fix their salaries, subject to the approval of the Lieutenant-Governor in Council, and to remove them at pleasure: secs. 3, 45, 59, 50, 52, 55, and 59.

4. The Board has exclusive jurisdiction as to all matters and questions arising under Part I. and "the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process in any Court or be removable by *certiorari* or otherwise into any Court:" sec. 60.

5. "No action shall lie for the recovery of the compensation . . . but all claims for compensation shall be heard and determined by the Board:" sec. 13. The Board has almost unlimited control over the "accident fund" and, concerning the employer and workman, broad and general discretionary powers, including the right to be beneficent as well as just. It is in effect an additional Court, but without the limitations that Courts must usually keep in view. The scheme of the Act throughout appears to secure a reasonable and moderate compensation for all workmen sustaining accidental injuries, as a substitute for the haphazard and occasional recovery of an extravagant or inadequate sum by a fortunate or unfortunate litigant. It manifestly includes cases where there was no common law right of action. The "accident fund" is in a way a provident and beneficent fund, a limited insurance for workmen generally; an accident policy; the statutory equivalent of a right of action, if a right of action there would otherwise be. Speaking of the scope of the Workmen's Compensation Act, 1906, it is said in Halsbury's Laws of England, vol. 20, para. 326: "The liability to pay compensation under the Workmen's Compensation Act, 1906, attaches to the relation of employer and workman quite irrespective of negligence. With few exceptions, it is an obligation upon every employer to make compensation to a limited extent, whenever death or disablement happens to a workman in the course of his employment."

6. If the Board determines that the subject-matter of a pending action is within its jurisdiction, its decision is final and the action shall be forever stayed: secs. 60 and 64 (4).

7. The Board may determine in advance as to its own jurisdiction, and as to the jurisdiction of the Courts, and the provisions of Part I. are "in lieu of all rights and rights of action, statutory or otherwise. . . . by reason of any accident:" sec. 15, as enacted by 5 Geo. V. ch. 24, sec. 8.

The jury found everything essential to the plaintiffs' success (again I am referring to the plaintiffs other than the hus-

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band and father), against the defendants. The finding does not matter either way. In the view I take of the claim, I have not to consider what the proof will be, but what is set up by these claimants, whether admitted or denied. They allege that the water supplied to them for drinking, and which they used, without suspicion of its impurity, was polluted, and that, in consequence, they became ill.

The defendants do not and cannot deny that they are compelled by statute to furnish pure water, nor can they dispute their common law obligation to furnish wholesome water, if they undertake to furnish it at all: *Ainslie Mining and R.W. Co. v. McDougall* (1909), 42 Can. S.C.R. 420.

They say that the water was pure, and, if it was not, that they did everything humanly possible to that end. Very well. If they endeavoured to get pure water, thought they had succeeded, and, despite their care, and without their knowledge, it became contaminated, the contamination was an "accident" on their part, in the ordinary sense of the word—whether the soil beneath the tanks, or beneath their factory, or breaks in the drainage system, or unsuspected seepage from the water-closets, was the source of contamination: it was an unintentional and unforeseen occurrence, an accident.

The defendants would not care to say that the alleged condition of the water was "wilful and intentional" on their part; but, if they did, the injury would still be "by accident" within the meaning and specific terms of the Act. And in the same ordinary sense the plaintiffs, drinking the water in the belief that it was pure, and sustaining injury, were injured "by accident." A druggist fills prescriptions for A. and B. at the same time; a medicine for A. and a poison for B. Say that the bottles are similar, although properly labelled. By mistake B.'s poison is sent to A. and A. takes it, without looking at the label, in the belief that it is what he sent for, and, as a consequence of his mistake, dies of poisoning. Was not his death accidental, the result of a double accident? Does it matter whether it is poison from a bottle or polluted water from a well? Why, only the other day a householder in this city got in something intended to be used for culinary purposes and harmless, perhaps serviceable, if properly used. Unfortunately, her mind being temporarily diverted to something else, she neglected to put it in a place of safety. A roomer or lodger seeing it, and imagining that the bottle contained alcoholic liquor, or a beverage of some kind, and thinking, as he said, that "it would be a good joke," drank part of it directly from the bottle, was poisoned, and, as I recollect the newspaper accounts, died almost immediately. In

popular language, "it was all an accident," and the statutory meaning is the ordinary popular meaning, with the "wilful and intentional acts" of the employer superadded.

Well then, without going outside the Act itself, I would feel no hesitation in saying that the claims here are within the exclusive jurisdiction of the Board.

There is, however, a pretty long line of directly relevant English cases. I refer particularly to two decisions in the House of Lords: *Innes or Grant v. Kynoch*, [1919] A.C. 765, and *Brintons Limited v. Turvey*, [1905] A.C. 230, there reviewed and applied. These cases are so directly in point that I would not have thought the exclusive jurisdiction of the Board upon the claims here set up reasonably open to debate, were it not that members of the Court more experienced than I am, are of an entirely different opinion: interpreting the case of *Scotland v. Canadian Cartridge Co.*, 59 Can. S.C.R. 471, as deciding the issue here. I will refer to this decision presently.

The English cases are collected and reviewed in the *Innes-Kynoch* case. They afford instructive examples of the application of the phrase "injury by accident" to unexpected and unforeseen casualties, under varying conditions, but I need not discuss them. I have derived very great advantage from a careful study of the dissenting judgment of Lord Atkinson in the *Innes-Kynoch* case. I will only refer, particularly, to the judgment of Lord Buckmaster, [1919] A.C. at pp. 776-7; it directly touches a point dwelt upon during the argument of this appeal, namely, the number of persons who sustained injury from the same source before or about the time the plaintiffs became infected. As to the earlier cases of infection at the defendants' factory, it is to be kept in mind that the plaintiffs were new arrivals in this country, and, if they heard of what had previously occurred, the defendants asserted, and it was generally believed, that changes had been made that completely remedied the previous condition. Lord Buckmaster said: "Lord Dundas, however, in *Drylie v. Alloa Coal Co.*, [1915] A.C. 1, expressed his view that disease was not an accident at all unless it could be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising, at an ascertained time, out of the employment. . . . I doubt if this careful analysis is sufficient. If, for example, in the case of *Brintons Limited v. Turvey* it had been shewn that several other workmen had all contracted anthrax, so that the disease could not be described as unusual or entirely unexpected, I cannot think that such circumstance would have destroyed the foundation upon which Lord Macnaghten's opinion was based. The

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accident would have been more common, but it would still have been an accident. Nor again is it possible to relate with certainty the onset of any bacterial attack to a time ascertained within anything approaching the certainty that attaches to an ordinary physical injury. In the case then under consideration where the pneumonia was strictly traceable to the chill caused at a particular moment, these conditions could possibly be satisfied, but I cannot think that they are of universal application, nor, if disease be accepted—as, in certain cases, *Brintons Limited v. Turvey* shews that it must—as an accident within the meaning of the statute, can the conditions of decision be formulated by any rigid or unyielding principle.” This is all I intended to quote, but it recalls a passage in the judgment of Lord Atkinson in the same case—reasoning to a different conclusion it is true—and I cannot refrain from quoting it, in this connection, as well. At pp. 780-1, Lord Atkinson said: “In truth, in one sense, the catching of an infectious disease is always fortuitous or accidental. There is always an element of chance in it. The fact well known to everybody in his daily experience that if a given number of ordinary persons be at the same moment, and under the same external circumstances, brought into contact with some source of infection, some of them will catch the disease, while others will escape it, proves this.”

It was argued, and this view is adopted by a majority of the Court, that we are bound by the judgment of the Supreme Court of Canada in *Scotland v. Canadian Cartridge Co.*, 59 Can. S.C.R. 471. Assuming that a question of jurisdiction was decided in that action, and, with great respect, I am not of that opinion, the conditions surrounding Scotland's injury and the principles applicable in that case are so obviously different from the facts as found in this action that they can afford no guide as to where the plaintiff in this action should seek compensation for his injuries. The defendants' factory in the *Scotland* case was built and maintained according to the plan and intention of the defendants, and without any provision for proper ventilation. The poisonous gases occasioning the injury were perceptible to the senses, the odor was distinct, offensive, and nauseating, the vapours were visible to the eye, particularly in cold weather, with the windows closed. The conditions, and the probable effect of the conditions, was known to everybody about the factory, including Scotland himself. Knowing all this, he accepted the employment, and, experiencing the evil effects from time to time, he still kept on working until through illness he could work no longer. The case comes within a line of decisions under the English Act in which it was held that the condition

occasioning the injury was so clearly incidental to the employment, the liability to infection or disease was so obvious, the occurrence was so clearly something to be expected, that it must be said that the workman knowingly undertook the risk, and it could not be said that the injury was "by accident."

I refer to such cases as *Martin v. Manchester Corporation* (1912), 5 B.W.C.C. 259—a workman engaged to clean out the mortuary of a fever hospital; *Broderick v. London County Council*, [1908] 2 K.B. 807—a man working on sewers; and *Eke v. Hart-Dyke*, already referred to. These cases are all under a statute in which "by accident" is to be interpreted according to its plain ordinary meaning: *per* Mathew, L.J., in the *Steel-Cammell* case above referred to, [1905] 2 K.B. at p. 237. It is not so under our Act, by reason of the interpretation clause, and for other reasons already discussed. Any happening, probable or improbable, foreseen or unforeseen, and "not being the act of the workman," appears to be within the purview of our Act.

Upon Scotland's application for compensation under the Act, the Workmen's Compensation Board decided that it was not a case of "personal injury by accident," and, upon a rehearing, at the instance of the employers, re-affirmed the decision. Scotland's rights, if any, were under Part I. of the Act (4 Geo. V. ch. 25, Ontario). By sec. 60 the Board is given "exclusive jurisdiction to examine into, hear and determine all matters and questions arising under " Part I., "and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court."

Scotland's right to redress, therefore, if any he had, was by action; and he brought action for damages, the action I have been referring to, and obtained judgment upon the findings of a jury. The defendants, amongst other things, set up the exclusive jurisdiction of the Board. This plea should not have been allowed to remain upon the record, but apparently the defendants did not move to have it struck out. The Court of Appeal (45 O.L.R. 586) set aside the judgment upon the ground that there was no evidence to support the jury's findings, the Chief Justice of the Common Pleas, who delivered the judgment of the Court, pointing out that the decision of the Board referred to was not open to review.

Upon appeal, the judgment of this Court was unanimously reversed by the Supreme Court of Canada (59 Can. S.C.R. 471), upon the ground that there was evidence upon which the jury could reasonably find for the plaintiff. The head-note of the

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case is erroneous. There was not, and, by reason of the statute, could not be, any judicial review of the decision of the Board. It is true that three of the six Judges, the Chief Justice, Mr. Justice Idington, and Mr. Justice Brodeur, incidentally expressed the opinion that the Board's decision was right, the latter evidently overlooking that it is not necessary under our Act that the notice should specify the date of the accident. Mr. Justice Duff pointedly refrained from expressing any opinion. Mr. Justice Mignault adopted the judgment of Mr. Justice Anglin; and Mr. Justice Anglin, with characteristic brevity and clearness, defines his attitude, at p. 491, in this way: "The reconsideration by the Board of the the plaintiff's claim for compensation was at the instance of the present defendant, and I agree with the learned Chief Justice of the Common Pleas that the Board's conclusion that the plaintiff's claim was not founded on a personal injury by accident within the meaning of the Act is binding on the defendant and not open to review in this action. If the question were open I should incline to apply and follow the decisions in *Steel v. Cammell Laird & Co. Limited*, [1905] 2 K.B. 232; *Martin v. Manchester Corporation*, 5 B.W.C.C. 259; *Broderick v. London County Council*, [1908] 2 K.B. 807; and *Eke v. Hart-Dyke*, [1910] 2 K.B. 677."

With this weight of eminent opinion in its favour, and for this reason only, I will not challenge the decision of the Board: I point out that it is the decision of the Board only, and binding only between the parties to it; and it has not the weighty sanction of a judgment of the Supreme Court of Canada.

Quite aside from all this, the conditions there and here are clearly distinguishable. Scotland knew of the conditions when he entered the service, and was reminded of them every day he was at work. In this case no one knew, and it is charitable to assume that even the defendants did not suspect, that the water was impure. There was no other Canadian case referred to touching the question of jurisdiction.

I would allow the appeal and dismiss the action.

Appeal dismissed (MEREDITH, C.J.C.P., and LENNOX, J., dissenting).

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[APPELLATE DIVISION.]

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HENDRIE V. GRAND TRUNK RAILWAY CO.

Railway—Level Highway Crossing—Injury to Vehicle and Driver Attempting to Cross Tracks—Subsequent Death of Driver—Actions for Damages—Negligence—Evidence—Findings of Jury—Duty of Railway Company—Special Warning and Application of Emergency Brakes—Allegation of Negligence in Respect of Statutory Warning (Railway Act, sec. 274)—Absence of Finding on that Question—Effect of.

H., driving a motor-truck along a highway, attempted to pass over the railway-tracks of the defendants at a level crossing, when the truck was struck by the engine of a passenger train of the defendants, with the result that the truck was damaged and H. seriously injured. H. began an action to recover damages for the injuries sustained, but died before it came to trial. It was revived in the name of his widow as administratrix of his estate; and she also, on behalf of herself and the children of the deceased, brought a second action under the Fatal Accidents Act. The two actions were tried together with a jury. Several acts of negligence were charged against the defendants, one being that the whistle and bell on the engine were not blown and rung as required by sec. 274 of the Railway Act. In answer to questions the jury found: that the defendants were guilty of negligence which caused the accident; that the negligence consisted "in not giving special warning and applying the emergency brakes;" and that H. was not guilty of any negligence which caused or contributed to the accident. Questions 5 and 6 and the answers thereto were as follows: "5. When the trainmen or any of them realised or ought to have realised that an accident was imminent, was it possible for the company to do anything to avoid the accident? A. Yes. 6. If yes, what? A. In not giving special warning and applying emergency brakes." The jury, in answer to questions put by the trial Judge, explained their findings as meaning that, in addition to the crossing-whistle, the whistle might have been specially sounded when the truck was first seen by the enginemen at a point 200 yards from the crossing, and the emergency brakes might at the same time have been applied so as to cause a slackening in speed:—

Held (MEREDITH, C.J.C.P., dissenting), that there was no evidence to support the findings of the jury as to the negligence of the defendants; and that the jury had by their findings negatived the other acts of negligence alleged by the plaintiff.

Andreas v. Canadian Pacific Railway Co. (1905), 37 Can. S.C.R. 1, followed.

Per MIDDLETON, J.:—There was no evidence that the enginemen did in fact realise that an accident was imminent; and, in the circumstances of the case, it could not be said that they were negligent in failing to realise the danger. Over and above the requirements of the statute there is the common law obligation to exercise due care in the transaction of business of necessity dangerous, even when it is fully authorised by law; but no breach of this obligation was shewn.

Per LENNOX, J.:—The defendants complied with the directions of the statute; and, in the absence of evidence, direct or inferential, of the knowledge of their servants of the existence of uncommon conditions

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calling for the exercise of special care, the presumption was that the defendants were not negligent; there was no evidence to rebut that presumption.

Per MEREDITH, C.J.C.P.:—There was evidence to support the findings of the jury. It could not properly be said that it was not the duty of the enginemen to have first sounded an alarm-whistle, and then, if that had no effect, have applied the brakes sufficiently to bring the train under greater control. The place was one of much danger; the train was an unusually dangerous one; there was evidence upon which the jury might have found, properly, that the train was running at a speed of 60 miles an hour; and it was running out of the usual time. It was a case for the exercise of more than ordinary care.

There was evidence on each side which would have supported a verdict either way upon the question whether the whistle was sounded at the whistling-post for this crossing, which was about a quarter of a mile from the crossing. The jury made no finding upon that question. No finding was not equivalent to a finding that the whistle was sounded: the jury may have been unable to find whether it was or was not; or may have concluded that it made no substantial difference whether it was or not, because the disaster was not attributable to what was done or not done there, but was attributable to later or earlier negligence.

Two actions for damages for negligence of the defendants causing injury to and the subsequent death of Thomas Hendrie.

The actions were tried together, before MULOCK, C.J.Ex., and a jury, at a Hamilton sittings.

J. P. MacGregor and *B. W. Hopkins*, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

March 7. MULOCK, C.J. Ex.:—These two actions arise out of the same accident, and were tried together before me, with a jury, at the recent Hamilton assizes. Thomas Hendrie was the owner of a motor-truck which he operated for hire between Hamilton and Niagara Falls, and at about noon on the 4th October, 1919, was driving it in a westerly direction along the public highway known as the Whirlpool road, where it crosses, on the level, the double tracks of the defendant company's railway at a point known as Morrison's crossing, when a passenger train of the defendant company struck and damaged the truck and seriously injured Thomas Hendrie. Thereupon he began the first action for damages because of injuries to himself and the truck; but before the trial he died, and the action was revived in the name of his wife, administratrix of his estate; and she also, on behalf of herself and the children of the deceased, brought the second action for damages under the Fatal Accidents Act.

From the inartistic statements of claim I gather the following

to be the acts of negligence charged against the defendant company: (1) that the brakes and other train appliances were defective, whereby the train was not under proper control; (2) that the train was being driven at an immoderate rate of speed; (3) that the company's employees failed to keep a proper look-out when approaching the crossing; (4) that the company's employees failed to reduce the train's speed, and thereby prevented the deceased from escaping injury; (5) that the whistle was not sounded and that the bell was not rung, as required by the statute.

The following are the questions submitted to the jury, with their answers:—

1. Was the defendant guilty of any negligence which caused the accident? A. Yes.

2. If yes, in what did such negligence consist? A. In not giving special warning and applying the emergency brakes.

3. Was the deceased guilty of any negligence which caused or contributed to the accident? A. No.

4. No answer.

5. When the trainmen or any of them realised or ought to have realised that an accident was imminent, was it possible for the company to do anything to avoid the accident? A. Yes.

6. If yes, what? A. In not giving special warning and applying emergency brakes.

7. What is the total amount of damage which you assess to the plaintiff? A. \$8,000.

8. What amount, if any, is included in the above mentioned sum in respect of damages up to the time of the death of the deceased? A. \$2,850.

9. What amount, if any, is included in the last mentioned sum in respect of pain and suffering of the deceased? A. \$200.

10. In what proportion do you divide between the widow and children whatever sum they may be entitled to because of the death of the deceased? A. Widow, \$3,000; children, \$5,000.

The answers to the 2nd and 6th of these questions being indefinite, I questioned the jury as to their meaning, and the following is the stenographer's report of the jury's explanation:—

"May I ask you what you mean. You say in answer to the 2nd question and to the 6th question—'In what did the negligence consist, and what might the trainmen have done to avert the accident—'In not giving special warning and applying the emergency brakes.' What do you mean by saying 'not giving special warning?' Foreman: We thought, your Honour, the whistle could have been specially sounded.

"His Lordship: What do you mean by that? Foreman: In

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addition to the crossing-whistle, the whistle might have been specially sounded.

"His Lordship: When? Foreman: When the truck was observed.

"His Lordship: "Do you mean at a point 200 yards from the crossing? Foreman: Yes, your Honour.

"His Lordship: When the fireman and engine-driver say they first observed it? Foreman: Yes.

"His Lordship: They should have given the warning then? Foreman: Yes.

"His Lordship: What do you mean by saying 'apply the emergency brakes?' Foreman: The same as they did later on. Emergency brakes were applied later on when the truck was in front.

"His Lordship: Is it your opinion, if the emergency brakes had been applied at some period after the possibility of an accident arose, that they would have effectively prevented the accident? Foreman: We believe so, slackening in speed.

"His Lordship: The application of emergency brakes at 200 yards from the crossing would, in your opinion, have averted the accident? Foreman: We felt so.

"His Lordship: Are you all content that the answers which your foreman has given to me to the questions which I have now put to him shall be considered as part of the answers which you have brought in? A. Yes.

"His Lordship: You all agree that shall be, do you? Do you all endorse the answers of your foreman as part of your answers to those questions? Foreman: On some of our questions we stood ten for, two against. We felt—we understood that was sufficient. Ten to two we stood.

"His Lordship: Are there ten of you agreed upon the answers which you have given to me? Foreman: Yes, sir.

"His Lordship: Are there ten of you who also agree to the statements made by the foreman now in answer to my questions? A. Yes, sir.

"His Lordship: Who amongst you does not accept the answers given by the foreman? If not, stand up. (Two jury-men stand up).

"His Lordship: Then I am to assume that the remaining ten adopt the answers of the foreman to the questions which I have now put to you?"

As thus explained, the jury's findings are to the effect that the accident was caused by the company's negligence in failing, when the train was at a distance of 200 yards from the scene of the accident, to sound the whistle and to apply the emergency

brakes, and that the company was not guilty of any other act of negligence. Thus it follows (*Andreas v. Canadian Pacific R.W. Co.* (1905), 37 Can. S.C.R. 1) that, as required by sec. 274 of the Railway Act, the company sounded the whistle when the train was 80 rods from the crossing, and that the bell was rung continuously from that point until the engine crossed the highway.

The line of railway at Morrison's crossing is double-tracked, and the train in question was proceeding in a south-easterly direction along the westerly track, and the deceased with his brother was proceeding westerly along the Whirlpool road, the deceased sitting on the left and driving.. The truck had a wooden top with solid wooden sides.

According to the evidence of the brother, they were both on the look-out for approaching trains, but the brother swore that he did not see the train until the truck had crossed the easterly track, and the front wheels were on the first rail of the westerly track, and that he then jumped. He swore that the speed of the truck as it approached the crossing was about 6 miles an hour; that the deceased was a good chauffeur; and that the truck could have been stopped within a distance of 3 feet.

For a distance of 140 feet easterly of the crossing there was nothing to prevent the occupants of the car seeing the approaching train, except two trees, one an apple-tree situated 60 feet easterly of the crossing, and another a hickory-tree situate 140 feet from the crossing. The space between these two trees was fairly open, and from a point about midway between them there was a clear view along the track for a distance of 1,300 feet. As the truck proceeded westerly and passed the apple-tree, there was a clear view between that point and the nearest track of 50 feet, and a further clear view of 18 feet, or a clear view of nearly 70 feet between the apple-tree and the westerly rail.

When the train reached the 200 yard point above referred to, the engine-driver was at the right side of the engine on the look-out, and swore that he saw the truck slowly approaching the crossing; that it was then between the hickory-tree and the apple-tree, and that he thought it was going to stop. The fireman was also in the cab on the left side, and his evidence was to the same effect as the engine-driver's. As the train approached the crossing the fireman realised that a collision was imminent, and at once "yelled" to the engine-driver, who immediately sounded the whistle and applied the emergency brakes, but the engine struck the right hind wheel of the truck, and thereby the accident which has given rise to these actions occurred.

In effect the jury find that, when the train was at a point 200 yards distant from the crossing, the company were bound to have

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given a special warning, and to have applied the brakes, and that their failure to do both of these things was the cause of the accident.

It is not the duty of the defendant company whenever their train is approaching a level highway crossing to give special warning, and to apply the brakes, which means to slow the train. The statute has declared what, under such circumstances, their duty is, and in this case the company had performed their statutory duty. Were there any exceptional circumstances which created a new duty? If, when the train was within 200 yards of the crossing, those in charge had reason to believe that a collision would take place unless they gave special warning and applied the brakes, it was their duty to have done these things, but not if they had no reason to apprehend an accident. Were it otherwise it would mean that whenever a train was approaching a level crossing, and any one on the highway was also approaching it, under circumstances like those in this case, the company must give special warning and slow up the train. If such were law, the operation of steam railways would be impracticable.

I am unable to discover here any circumstances that made it the duty of the company to give such special warning and to apply the brakes. The whistle had been sounded and the bell was ringing, as required by the statute. The approaching train was visible to the occupants of the truck when it was in a place of safety, and where it could have remained, and the truck was proceeding at the readily controllable speed of about 6 miles an hour on a slightly up-grade road. There was nothing in any of these circumstances to cause a careful trainman to suppose that the driver of the truck intended to run the grave risk of an accident by endeavouring to cross the tracks in front of the train. On the contrary, they were justified in assuming that he would act with prudence and remain in a place of safety, and, therefore, they were not bound to give special warning and apply emergency brakes.

For these reasons, I am of opinion that there is no evidence to support the jury's findings of negligence, and that the actions should be dismissed with costs.

The plaintiff appealed from the judgment of MULOCK, C.J.Ex.

October 5. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and LENNOX, JJ.

J. P. MacGregor and *J. M. Chisholm*, for the appellant. The two actions are distinct and separate, though tried

together; the first action was revived by the administratrix under sec. 41 of the Trustee Act; while the second action was brought by the widow on behalf of herself and infant children, under Lord Campbell's Act, and is for a separate and distinct cause of action: see *British Electric R.W. Co. Limited v. Gentile*, [1914] A.C. 1034, 18 D.L.R. 265. It was for the jury to decide what part, and how much, of the enginemen's evidence they would believe: *Jones v. Canadian Pacific R.W. Co.* (1913), 30 O.L.R. 331, 13 D.L.R. 900. Upon the evidence there was a common law duty to give special warning and to avoid running Hendrie down by applying the brakes: *City of Calgary v. Harnovis* (1913), 48 Can. S.C.R. 494, 15 D.L.R. 411; *Rex v. Broad*, [1915] A.C. 1110. The case is clearly within the facts, and, therefore, within the authority of *Canadian Pacific R.W. Co. v. Hinrich* (1913), 48 Can. S.C.R. 557, at p. 559, 15 D.L.R. 472, at p. 473. The learned Chief Justice at the trial erred in finding, as a fact upon which to base his judgment in the face of the verdict, that the statutory warnings had been given. No such finding was made by the jury. The highest ground upon which their finding could be put was that the absence of statutory warnings was not the proximate cause of damage; because, after the statutory whistle should have been given, there was time and opportunity, to the knowledge of the enginemen, efficiently to warn Hendrie: see *Jaroshinsky v. Grand Trunk R.W. Co.* (1916), 37 O.L.R. 111, 31 D.L.R. 531. There was a duty to avoid running down Hendrie, who was first on the crossing: *Rex v. Broad*, *supra*. It was the breach of this duty that the jury found to be the proximate and primary cause of the damage; and, as there was affirmative evidence that Hendrie was driving slowly and continuously, and no affirmative evidence that he knew of or had reason to suspect the presence of the late train coming down on him in silence, the finding that Hendrie was not guilty of contributory negligence should stand: *Grand Trunk R.W. Co. v. Hainer* (1905), 36 Can. S.C.R. 180; *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72. There was, upon the evidence, after Hendrie had been allowed to put himself in a position of danger, the continued omission to sound the whistle, and this became the ultimate negligence causing the disaster, within the rule in *British Columbia Electric R.W. Co. v. Loach*, [1916] A.C. 719, 23 D.L.R. 4. The learned trial Judge further erred in refusing to allow certain evidence, notably evidence of the reasonableness of compensation paid in a similar case and authorised by the Ontario Workmen's Compensation Act in respect of such a loss.

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D. L. McCarthy, K.C., for the defendants, respondents, relied upon the evidence as supporting the trial judgment, and contended that the case was governed by the decision in *Andreas v. Canadian Pacific R.W. Co.*, 37 Can. S.C.R. 1.

MacGregor, in reply, distinguished the *Andreas* case, and referred again to *Rex v. Broad*, *supra*.

November 4. MIDDLETON, J.:—The learned Chief Justice in his judgment at the trial has set out the facts with his usual painstaking care, and they need not be repeated.

The only allegation of negligence to be considered is that arising upon the answers of the jury, for they were warned that no negligence would be considered that was not found by them. The finding of the jury is that when the train crew realised or ought to have realised that an accident was imminent the whistle should have been sounded and the emergency brakes should have been applied. From the oral explanation of the foreman, this meant that, when the deceased was seen 200 yards from the crossing, he might have heard the whistle and stopped, and if the brakes had then been applied, though the train would not have been stopped, it would have slowed down sufficiently to allow the truck to have crossed the track safely. The plaintiff's counsel does not suggest that the answers mean more than this.

There is no evidence that the train crew did in fact realise that an accident was imminent.

The question thus narrows itself to this—was there any evidence that under the circumstances the train crew were negligent in failing to realise that an accident was imminent?

There is no question as to the law. It is not enough for the railway employees to obey the requirements of the statute—these are an irreducible minimum—but over and above these requirements there is the common law obligation to exercise due care in the transaction of business of necessity dangerous, even when it is fully authorised by law: *City of London v. Grand Trunk R.W. Co.* (1914), 32 O.L.R. 642, 20 D.L.R. 846; *Bogle v. Canadian Pacific R.W. Co.* (1921), 19 O.W.N. 508.

The obligation is precisely the same as that which arises in an emergency following the plaintiff's negligence, commonly called the question of ultimate negligence. Did the defendant do all that he should have done to avert the disaster after he knew or ought to have known that it was imminent?

The plaintiff's counsel has summed up the circumstances which he contends shew negligence on the part of the train crew in failing to realise the peril of this man. They all resolve themselves into the one proposition, that, because the fireman

saw the deceased "proceeding slowly, cautiously, and unhesitatingly" toward the track for some 6 seconds, he (the fireman) was at fault in failing to realise that the deceased did not know of the on-coming train, which was in his full view if he looked. When the engine-driver saw the deceased, he was 50 or 60 yards from the crossing. He was after this out of view by reason of the long engine-boiler. The fireman, who had the better view, saw the truck, and says he "thought the man was going to stop till the train passed;" that, as soon as he saw he was going on the track, he called the engine-driver, who at once stopped the train. It was then far too late to avoid the impact.

I agree with the learned trial Judge that there was no evidence of any negligence to go to the jury. I agree with my Lord that the Court must sedulously avoid usurping the function of the jury. But, on the other hand, it is the duty of the Court firmly to maintain its own function and to determine whether there is any evidence which can in any view justify the verdict. It is for the Judge to say whether from a given state of facts negligence can be inferred, and for the jury to find whether the inference ought to be drawn. In my opinion, there is here no evidence upon which negligence can be found, and the case was rightly dealt with at the trial.

In all cases such as this, where no one can avoid sympathy for the plaintiff, there is a temptation ever-present to both Judge and jury to lean towards the plaintiff's side; and, where there is some evidence, so that the jury's finding cannot be reviewed, the plaintiff has an advantage; but this cannot justify the upholding by the Court of a verdict where there is no evidence to justify it.

If dangerous level crossings are to be maintained without protection because neither the railway company nor the public can afford the expense necessary for a change to a condition of safety, I venture to suggest that compensation for the inevitable disaster ought to be borne by the public at large, either directly or through the railway companies, upon the same principle that injuries to workmen are regarded as an incident to all industries and are the subject of compensation even when arising from the negligence of the person injured. Verdicts of juries contrary to evidence were frequent in accident cases before the Workmen's Compensation Act, and represented the attempt of illogical minds to achieve justice, and the same thing is true of many verdicts in crossing cases.

I cannot part with this case without deprecating the novel and indefensible style of pleading adopted by the plaintiff. Instead of a concise statement of the material facts, the pleading

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is a verbose and somewhat declamatory summary of the evidence which it was hoped would be given.

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LENNOX, J.:—The defendants were not guilty of the breach of any statutory duty or order of the Railway Board. There was evidence pro and con as to this, but the single act of negligence found by the jury negatives the plaintiff's contention that the engine-whistle was not sounded when the train came within 80 rods of the highway-crossing in question, and that the bell was not "rung continuously from time to time" during the passage of the train over the intervening 80 rods: in other words, it is to be taken that the jury accepted the evidence of the defence upon this question: *Andreas v. Canadian Pacific Railway Co.*, 37 Can. S.C.R. 1.

It is quite true that a railway company may be guilty of actionable negligence without breach of any duty or obligation imposed by statute—railway companies are still subject to common law obligation to exercise reasonable care. The statute is the measure of safety provided by Parliament to meet the ordinary conditions of interchanging traffic over the railway and the highway, and the legalised rule, too, governing the operation of railways under the jurisdiction of the Parliament of Canada in all ordinary circumstances. Exceptional conditions may of course arise, and, confronted by extraordinary conditions pointing to the probability of a collision, the company is called upon to do all it can—short of incurring a greater danger to its passengers and servants—to avert a disaster. The onus of proving that conditions are exceptional, and, to the servants, obviously fraught with peril, is upon the party setting up negligence. The possibility of an accident is not enough—there is always a possibility at level crossings. The company complied with the direction of the statute; and, in the absence of evidence, direct or inferential, of the knowledge of the company's servants of the existence of uncommon conditions calling for the exercise of special care, the presumption is that the company were not negligent. There must at least be some evidence in support of the jury's finding to entitle the plaintiff to judgment. Was there any evidence? Eliminating the contention negatived by the finding of the jury, the alleged failure to comply with the statute, there is no conflict of testimony as to the surrounding circumstances or the conditions under which the accident occurred. Counsel for the plaintiff, at the trial, with quite unnecessary elaboration in the notices of appeal, and upon the argument in this Court, dwelt

upon the training, intelligence, and exceptional capability of the deceased Thomas Hendrie as the driver of a motor-car, and that, upon the evidence for the defence, he was driving "slowly and carefully" when first seen by the engine-driver and fireman—the engine being then about 200 yards and the truck about 50 from the crossing—and each in open view of the other. And he was also careful to emphasise that the railway servants assumed, "took it for granted," that the driver of the truck would stop in time, and would certainly not attempt to cross in front of a rapidly moving train on a down-grade line.

"Mr. MacGregor: Q. I suppose, Mr. Dobson (the fireman), that the fact is, that you and Mr. Stewart (the engine-driver) took it for granted that this truck would come to a stop and you would go by? A. There was nothing in the movement of the truck that would indicate it would not.

"Q. I suppose you took it for granted? A. Yes."

And why not? The view of the engine-driver was obstructed by the boiler until the engine was almost on the crossing, but the fireman was in a position to see and keep upon the look-out. Until it was too late to avert the collision, the slowly moving truck—going at about 6 miles an hour, as James Hendrie says—of course confirmed the impression that the driver had no intention of attempting to cross ahead of the train.

The deceased was familiar with the conditions, he crossed at this point several times a week. There is no evidence that he looked or took the slightest precaution for his safety, until his front wheels had crossed the first rail, when, but too late, he attempted to speed up. The other occupant of the truck—James Hendrie—tells the story in a very few lines:—

"I remember the front wheel bumping over the first rail of the track, and I looked to the right again, and there was a train coming whisking by us, I guess 50 or 60 miles an hour. By this time our wheel had crossed the front track, and I shouted to my brother to speed up—there is a train coming—and he evidently speeded up. I seen we couldn't make it, and jumped, and I jumped clear."

He said that at the rate they were travelling the truck could be stopped in 3 feet. He looked twice. Upon cross-examination he said, "If I had kept looking I would have seen the train;" and his brother had an equal opportunity of seeing it. When the truck was 50 yards from the track the two men on the engine could see the truck, and the fireman says that it was continuously in his view afterwards until the collision occurred. It follows that the driver of the truck would have seen the engine from any point in the 50 yards, had he been exercising reasonable care.

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And, on the evidence of the defendants' engineer (Mr. Hewson), the driver of the truck, looking from a point on the highway over which he passed, and 96 feet distant from the first rail, could see the railway over which this train approached him for a distance of 1,300 feet, at least.

I do not propose to discuss the question of whether the deceased was negligent or was the unfortunate author of his own death. The question of a new trial was not, I think, referred to. An intelligent man, in full possession of his senses, sight and hearing included, knowing of the railway crossing and all its surroundings, driving a "silent engine," and crawling along at 6 miles an hour, as James Hendrie says, apparently unconscious or heedless of the statutory warning, and of the "long blast" for Clinton Junction as well, and apparently only aroused from his reverie when his brother called out to him to "speed up," has been exonerated by the jury from negligence of any kind.

Paraphrasing the answers to the 1st, 2nd, 5th, and 6th questions, the jury found that the company's servants were guilty of negligence causing the accident, in that, after they realised, or ought to have realised, that an accident was imminent, they could have avoided it by giving special warning and applying the emergency brakes.

The explanations given to the learned Chief Justice shew that this all refers to the time when the engine-driver was about 200 yards and the truck about 50 yards from the crossing.

Is there any fact or circumstance in evidence to suggest even to the company's servants at that time, or in fact at any time before a collision was inevitable, that an accident was imminent or even probable, or that there was reason for the exercise of more than ordinary care? I can find nothing. In every section of this country, with its network of railways, on every day in the week, and, in the busy hours, every moment of the day, men are driving just as this man was driving, towards a railway crossing, fully alert to the fact that a train is approaching, and stopping within a few feet of the rails, and in time to let the train go by. I find nothing in this case to separate it from the ordinary, everyday conditions of highway traffic to and across railway intersections.

The questions presented by these appeals are not new. They are to be decided upon the principles governing the decision in *City of London v. Grand Trunk R.W. Co.*, 32 O.L.R. 642, and I refer particularly to what was said there by my learned brother Riddell, at p. 664.

I am of opinion that the appeal should be dismissed.

MEREDITH, C.J.C.P.:—These actions were brought by the plaintiff to recover damages from a railway company, who are the defendants in them, for personal injuries to and the death of Thomas Hendrie, when a motor-truck, which he was driving, was run down by a very fast running express train, of the defendants, on an open highway which the railway double-tracks crossed on a level with the open road.

The trial of the actions was by jury; and the verdict of the jury was: that the deceased's injury was caused by the negligence of the defendants; that such negligence was "in not giving special warning and applying the emergency brakes;" and that the deceased was not guilty of contributory negligence; and they also found: that the enginemen might have avoided the accident, after they realised, or ought to have realised, that an accident was imminent, by "giving special warning and applying emergency brakes."

The case was fully tried; and there is no suggestion that there was any misconduct or misconception, in any way, by the jury; on the contrary, the case seems to have received their careful and intelligent consideration; and the more so as they were not unanimous; the verdict was given by ten of them, two disagreeing, and so making it more certain that all the facts of the case, and all that could be said on each side, was present to the minds of all the jurors; and their intelligence and understanding of the case is further made evident by their foreman's answers to a number of questions which the trial Judge asked him when their verdict was rendered.

The grounds upon which the jury found for the plaintiff were explicitly put to them by the trial Judge, in his charge to them, as grounds upon which they might find for the plaintiff, and were so put without any kind of objection by any one. The learned Judge asked them: If "when they," that is, the enginemen, "first discovered the truck," when "the train was within 200 yards of the crossing, if they had done everything that was possible, could they at 200 yards have brought the train to a stop and have averted the accident? That is a feature that you will deal with when considering the question." And again: "they," that is, the enginemen, "must try to avert an accident which seems to reasonable men likely to happen unless they slow down or stop;" and "if, notwithstanding the right to cross the street at the highest rate of speed, those in charge of the train, controlling it, discover that unless they slow up and adopt some extra precaution they may cause an accident—in that case the common law steps in and imposes a duty."

The charge was not as favourable, in this respect, to the

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plaintiff as it should have been, because it seems to have been dominated by an impression that what is generally called ultimate negligence was needed to support the action, though it might be sustained as well by that which is commonly called primary negligence; for it might have been the duty of the enginemen to have sounded the whistle, as the jury found that they should have done, even though they did not appreciate the fact of the imminent danger which ended in the injury and death of Thomas Hendrie; however "the situation was saved" in that respect by the questions submitted to the jury, coupled with the jury's intelligence and care.

Notwithstanding that the case was so submitted to the jury, and notwithstanding their clear verdict in the plaintiff's favour, the trial Judge, some time after the trial, ignored the verdict and directed that judgment be entered for the defendants.

There is, need it be said, no appeal from the verdict of a jury. The general rule is that a verdict once found ought to stand. Yet, if there be no evidence upon which reasonable men could find as a jury has found, the Courts have power to set aside, and to enter judgment contrary to, such a verdict. But in such a case as this, in which the jurors must, from experience, know more than Judges, having some knowledge of the place where the accident happened, and of the working of railways and of traffic on highways in the locality, and indeed generally; and in which there have been no complicated questions to consider and no misconceptions or misconduct, actual or even suspected, but there has been a careful trial and an intelligent and clear verdict, one must have much faith in his own judgment to be able not only to say that the verdict is an unreasonable one, but is so unreasonable that no reasonable ten men could have given it—that ten men who should know more than we about such things have given a verdict which no ten reasonable men could give. It is not uncommon for each of two persons in a controversy to say or think the contention of the other unreasonable; but that is far from saying that no reasonable person could have made it. There seems to be some danger of a verdict being disregarded because the Judge thinks it unreasonable, and treats that as equivalent to considering that reasonable men could not have so found.

In this case my conclusion is not only that the verdict is one which reasonable men might find; but that it is a proper one; though I do not go so far as to say that no reasonable man *could* find otherwise, but only that he *should* not.

The facts are plain and simple:—

The place in question was a wholly unguarded crossing, by

two railway tracks, of a highway at "rail level;" necessarily a place of danger, but, in the circumstances of this country, often practically an unavoidable one. It was crossed many times during the day and night by trains of the defendants running both ways and generally running at a speed of from 10 to 30 miles an hour, but there were a very few trains called "flyers" which ran at a much greater speed; the train which injured and killed Thomas Hendrie was one of "the flyers," and there was a "down-grade" approaching the crossing as that train was.

The engine-driver happened to be a "spare man," taken from a yard or freight train locomotive, to fill temporarily the place of a regular driver; and he had very little experience in such work or "in emergencies," never but once having applied what is called—rather misleadingly—because there is only one air brake and the difference is only in the speed and force with which it is applied—the "emergency brake," and certainly not best able to do, or to say what should be done, in an emergency.

The whistling-post for this crossing is about a quarter of a mile from the crossing; and whether the whistle was sounded there or not was one of the questions in controversy at the trial, and there was evidence on each side which would have supported a verdict either way upon that question. The jury made no finding upon it. It is said, for the defendants, that no finding is equivalent to a finding that the whistle was sounded: but that is obviously not so; the jury may have been unable to find whether it was or was not; and, that which is more to the point, may have concluded that it really made no substantial difference whether it was or not, because the disaster was not attributable to what was done or not done there, but was attributable to later or earlier negligence.

There was evidence upon which the jury may have found, properly, that the train was running at the speed of 60 miles an hour. The fireman, who was somewhat indefinite in his evidence on this question, said that it might have been running from 45 to 50 miles—and the driver admitted that much too—and also that this train regularly goes "past that crossing at 50 miles an hour." According to his testimony, the train was an hour and a half "behind time," the driver said an hour and twenty minutes. It was one of the most important trains making connection at Niagara Falls with the day-train for New York, and so it is altogether likely that everything was being done that could be done to make up for lost time.

The story of the enginemen is: that the injury was done about noon on a bright day; that they saw the truck when they were about 200 yards from the crossing and the truck was about 50 or

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60 yards from it, "likewise approaching the crossing, but going slowly."

From the whole evidence the jury might well have found that the truck was proceeding at a speed of 6 miles an hour and the train at 60; but, whatever respective speeds could have been found, it is obvious that the enginemen's opinions of respective distances from the crossing are wrong. At 60 and 6 miles an hour, if the truck were 60 yards away, the engine must have been 600; whilst, if the engine were 200, the truck must have been 20; else they could not have met as they did on the crossing. At the usual speed of 50 miles the engine must have been 500 yards, or the truck only 40 yards, that is from the track on which the train was; the nearest part of the other track would be 5 or 6 yards nearer to the truck.

The truck was plainly in sight of either driver or fireman from the time it was first seen until the crash came. The fireman, who had the better opportunity for observing, states what occurred thus:—

"Mr. McCarthy: Tell us what you saw of the man in the truck? A. I couldn't see the man in the truck—there seemed to be a curtain down on the side of the truck.

"Q. What did the truck do? A. Come right on.

"Q. Vary its speed at all? A. I couldn't notice it vary its speed at all.

"Q. Going slowly? A. Going slowly.

"Q. At what point was it you yelled? A. I would judge probably about 30 yards when I shouted out to the engineer.

"Q. From the crossing? A. Yes, sir.

"Q. Where was the truck then? A. About the first wheel was upon the first rail of the west-bound track.

"Q. The front wheel of the truck was on the first rail of the west-bound track? A. Yes.

"Q. In that position you yelled to the engineer? A. Yes, sir.

"Q. And the engine went on? A. That is right."

So that, whether it was 200 yards or 600 or any other distance, these enginemen, under those circumstances, ran down the truck and killed the driver without making the least attempt to save him, though effectual means were at their hands, one of which could have been employed almost as easily as left wholly untried.

There was nothing to indicate that those on the truck knew of the approach of the train; they could not be seen—"there seemed to be a curtain down" on that side of the truck. If the enginemen could not see them, it was probable that they could

not see the engine; and they kept steadily coming on towards inevitable destruction if nothing were done to avert it. The enginemmen knew that the "flyer" was out of time, and would be unexpected; they knew that ordinary trains ran at less than half their speed; that between the crossing-whistle and the crossing there was usually from 30 seconds to a minute; with them less than 15 seconds; that with an ordinary train—and they were probably 30 to 1—there was abundance of time for a truck nearing the tracks to cross and be some distance beyond them before the train could reach the highway.

In these circumstances, and indeed without any of them except the steady approach of the truck, what possible excuse can the enginemmen have for not giving an alarm, for not making the whistle shriek, when the truck was so seen by them? It would cost nothing, it could do no harm, and was almost as easily done as left undone; and it might prevent a terrible and costly accident. I feel bound to say that, in my judgment, much less than intelligent judgment, even instinct, should have demanded a shrill alarm, an alarm which, having regard to James Hendrie's testimony as to what was happening on the truck, would have made it certain that the disaster should have been averted.

It is urged that the enginemmen might have rightly assumed that the truck would stop; and with some hesitation the fireman accepted that position thus (cross-examined by Mr. MacGregor):—

"Q. I suppose, Mr. Dobson, that the fact is that you, like Mr. Stewart, took it for granted that this truck would come to a stop and you would go by? A. There was nothing in the movement of the truck that would indicate it would not.

"Q. I suppose you took it for granted? A. Yes."

This man saw the truck, with, he thought, a blind down, obscuring his view of any one in it, and likewise any one's view from it of the engine, and he saw it come slowly and steadily on, until it was on the other track, before doing or saying anything. The engine-driver did not see the on-coming of the truck, and so was in no position to form any opinion of what the driver of the truck intended to do; so the jury might very properly find that there was no justification, or excuse, for taking it for granted that the truck would stop, and doing nothing when so much might so easily have been done. Whatever any one else may think of the reasonableness or unreasonableness of it, I feel bound to say that in my judgment the failure to give an alarm-whistle when the truck was seen steadily approaching the track,

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with apparently a blind down, was a grossly negligent thing and the proximate cause of the disaster.

If it had been given, it should have awakened the driver to a sense of the fact that the train was not one of the many tortoisés, but was one of the few hares—the “flyer”—which would cover the quarter-mile or so in 15 seconds or so, and have caused him to stop.

But, even if it did not, it should have put the blame on him, if he went on and suffered; unless the speed of the train ought to have been checked so as to avoid an imminent, or at least likely, accident, in which case the defendants should be liable even though the alarm had been given and had been unheeded; but that would be a different case.

In this way, in my opinion, the verdict not only may but must be sustained and effect given to it; and indeed if the case had been tried by me, without a jury, in this way the plaintiff should have succeeded.

The other separate ground upon which the jury found the defendants also liable, namely, that the defendants could and should have avoided the accident by sooner checking the speed of the train, is not, in my judgment, as strong an one as the other, yet it is one on which I have no doubt reasonable men could well found a verdict for the plaintiff.

The trial Judge spoke of it as stopping the train: but, of course, that was not at all necessary; a very slight slackening of speed, one-third or so of a second, should have been enough. It was the hinder part of the truck that was struck; and, as it was going at the rate of about 3 yards a second, it almost escaped as it was.

I am quite unprepared to say that it was not the duty of the enginemen to have first sounded an alarm-whistle, and then, if that had no effect, have applied the brakes enough to bring the train under greater control; if obliged to determine the question, I should find that it was: the place was one of much danger; the train was an unusually dangerous one; and it was running out of the usual time. It was a case for the exercise of more than ordinary care.

Admittedly it was the duty of the enginemen to have applied the brakes at some time. Why wait until the disaster was unavoidable? Who but the jury is to say just when that duty should have been performed? It is useless to talk of the impossibility of carrying on the business of a railway if its trains must be stopped at every level crossing when a vehicle on the highway is in sight; it would be just as sensible, if not

more so, to say that if, in such a case as this, the speed of trains were not slackened, owners of trucks could not carry on business, and that no vehicle could go safely on a railway crossing, and still more so to say that it would be impossible for railway companies to carry on business if their enginemen ran down vehicles as this truck was run down, when a whistle or a lowering of speed a fraction of a second would have prevented it. Why wait until the front wheels of the truck were on the first track?

In this case nothing turns on the question of contributory negligence. There was no suggestion that James Hendrie was guilty in that respect; and so the only question submitted to the jury was whether the deceased (the driver of the truck) was so guilty; and his guilt, if there had been any, could not be attributed to this plaintiff. So, too, contributory negligence is out of the question on the jury's finding of ultimate negligence of the enginemen. And, in addition to that, the jury have found that there was no contributory negligence; and there is evidence upon which reasonable men could so find. Even if the driver heard the crossing-whistle, that might only lull him into security, knowing it was not the time for the "flyer," and that with ordinary trains there was what drivers like to call "tons of time" to cross over in safety, and it must not be forgotten that, whilst the enginemen were traversing the 600 or the 200 yards in the 20 or the 7 seconds, whichever it may have been, with the steam shut off, the engine drifting, as it is called, down the grade, neither had anything to do but look out and avoid accident, whilst the truck-driver must have been constantly employed, mind and arms, in guiding his car and also looking ahead to avoid accident; that his car was not, like the engine, guarded by iron rails which performed the main duties of its safe guidance.

The case was, in my opinion, one for the jury; and it was so treated by every one concerned in it at the trial; the jury, not the Judge, were the chosen judges of all the questions of fact upon which the rights of the parties depend; they have with care and clearness performed that duty; and I feel bound to say that, in my judgment, it is an usurpation of their exclusive power for any Judge to ignore their verdict and give judgment between the parties in the teeth of it.

Therefore I am in favour of allowing this appeal, and giving effect to the jury's verdict.

Appeal dismissed (MEREDITH, C.J.C.P., dissenting).

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[APPELLATE DIVISION.]

Nov. 4.

CHILDS V. FORFAR.

Parent and Child—Liability of Parent for Support of Infant Child—Absence of Common Law Obligation—Criminal Code, sec. 241—Contract—Implied Promise—Consent of Father to Pay "Fair" Sum for Maintenance—Quantum Meruit.

The defendants, being married and the parents of a child, the wife's sister took the child soon after its birth, upon an agreement made between the wife and her sister, to which the husband was not a party, that the wife should pay \$2.50 a week for the child's maintenance as a member of the family of the sister and her husband (the plaintiff). A new agreement was afterwards made, in substitution for the old one, that nothing should be paid, but that the child should be given to the plaintiff's wife and him. The plaintiff and his wife maintained the child until it was taken from them by the defendants, and the plaintiff then brought this action, in which he was awarded in a County Court \$452 as the value of the maintenance of the child:—

Held, affirming the judgment of the County Court, upon appeal by the father of the child, that the plaintiff was entitled to the sum awarded.

Per MEREDITH, C.J.C.P.:—The appellant was not legally bound to pay for the maintenance of his child unless he had actually contracted to do so. The plaintiff failed to prove any kind of legal liability on the part of the appellant, and his action should have been dismissed had it not been that on the trial he consented to pay "what is fair;" and, having regard to all the evidence, it could not be considered that the amount awarded was not "fair."

Per RIDDELL, J.:—There was no evidence of an express promise on the part of the appellant to pay for the support of his infant child; but there was an implied contract on his part that, if he should, in the exercise of his paternal powers, take away the child, he should reimburse the plaintiff for its maintenance. By the common law of England there is no civil liability on a parent to support his child; but to neglect to supply a child with necessities is an offence at the common law and under the Criminal Code, sec. 241; and it is the parent's duty to supply the child therewith. The fact that the child which the appellant should have supplied with necessities was, with the appellant's full knowledge and consent, supplied with them by the plaintiff, in itself provided in law all the elements of a contract: when any one does for another what that other might legally be compelled to do, both request and promise to pay are implied. The amount allowed was not too much on a *quantum meruit*.

Per MIDDLETON, J.:—There is no civil obligation on the part of a parent to maintain his infant child; but his moral obligation to do so makes it is easy to find an implied promise to remunerate any person who, at his request or with his knowledge, undertakes to discharge this moral obligation for him; and in this case an implied promise was rightly found.

Per LENNOX, J.:—Upon the facts the plaintiff was entitled to recover. It was not necessary to express an opinion as to the liability of a father independently of contract, express or implied.

Review of the authorities.

Bazeley v. Forder (1868), L.R. 3 Q.B. 559, *Rex v. Lewis* (1903), 6 O.L.R. 132, and *Latimer v. Hill* (1915-16), 35 O.L.R. 36, 36 O.L.R. 321, specially referred to.

AN appeal by the defendant Harold Forfar from the judgment of the County Court of the County of Oxford in favour of the plaintiff against the appellant for the recovery of \$452 and costs in an action for money paid and the value of services rendered in maintaining a child of the defendants, who were husband and wife.

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October 6. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and LENNOX, JJ.

W. D. M. Shorey, for the appellant. There is no civil liability on the part of a parent to support his child, and there was no promise by the father to reimburse the adopters of the child: *Farrell v. Wilton* (1893), 3 Terr. L.R. 232. The enactments of the Criminal Code (as in sec. 241) cannot be made applicable, even by analogy, to this case. The adoption of the child was voluntary, and upon the evidence there is not even an implied contract on the part of the father to pay for its support.

J. S. Duggan, for the plaintiff, respondent. The *Farrell* case is distinguishable upon the facts, for in this case there is, upon the evidence, at least an implied contract to pay for the child's support; the law on this point is clearly set out in *Latimer v. Hill* (1915-16), 35 O.L.R. 36, 26 D.L.R. 800, 36 O.L.R. 321, 30 D.L.R. 660. See also *Wright v. McCabe* (1899), 30 O.R. 390; Halsbury's Laws of England, vol. 17, p. 116; *Hughes v. Rees* (1884), 10 P.R. 301; *Griffith v. Paterson* (1873), 20 Gr. 615, at p. 618.

Shorey, in reply, referred briefly to the evidence.

November 4. MEREDITH, C.J.C.P.:—The judgment appealed against can be supported only by an actual promise to pay, made by the male defendant to the plaintiff; and, of course, it should be enough whether expressed or tacit and whether made by this defendant himself or by another person authorised to make it for him: but it must be borne in mind that this defendant was under no legal obligation to pay for the maintenance of his child apart from an actual contract to do so.

Although the Legislature of this Province has recently, in line with some of the Poor Laws of England, made children in some cases liable for the support of their parents, there has never been any law in this Province making parents liable for the support of their legitimate children. The Poor Laws of England are not in force in this Province; and there is nothing in the Criminal Code of Canada purporting to create such a liability; and if there were it would be ineffectual, civil rights being within the exclusive jurisdiction of the Provincial Legislatures. The

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Criminal Code applies only to cases in which the father or head of the family "is under a legal obligation to provide necessities for any child . . . ;" and it may be that in other Provinces such a general liability exists; as there is in England in the Poor Laws; and the law as it is in this respect in this Province is not without something to be said in its favour: child-farming is generally against the interest of the child, of the parent, and of the public; families, homes, and home-ties, and direct paternal duties, rights, and powers are generally distinctly in the interests also of the child, the father, and the public.

In this case a tacit agreement is out of the question: the plaintiff relies, and relies solely, upon an expressed agreement. If there were not an expressed agreement, then the plaintiff and his witnesses are unworthy of credit, and the testimony of the defendants should be accepted and given full effect.

The testimony for the plaintiff was of an agreement with the female defendant, to which the male defendant was in no sense a party, that the female defendant should pay \$2.50 a week for the child's maintenance as a member of the plaintiff's family, his wife being the female defendant's sister; that that was rescinded soon after it was made, because the female defendant was unable to make the payment, and the male defendant would not pay anything; that a new agreement was then made in substitution for the old one, and that that agreement was that nothing should be paid, but that the child should be given to the plaintiff's wife and him.

The case of *Latimer v. Hill*, 35 O.L.R. 36, 36 O.L.R. 321, 26 D.L.R. 800, 30 D.L.R. 660, was very much discussed in this Court recently, first in this Division and afterwards in the other Division, without any one of the nine Judges before whom it was argued having even suggested that in this Province there was any legal liability apart from contract on the part of the father to maintain his child; or that he had not a legal right, notwithstanding his contract to the contrary, to the custody of his child.

The bargain, in this case, is thus stated by the plaintiff's wife:—

"Q. 55. I understand there was a distinct bargain between you and the mother of the child, you were to be paid what they were going to pay the man in Englehart? A. Yes.

"Q. 56. Two and a half a week? A. Yes.

"Q. 57. And that was distinctly agreed between you and Mrs. Forfar at two and a half a week? A. Yes.

"Q. 58. No doubt about it? A. No.

"Q. 59. Clearly expressed between you? A. Yes.

"Q. 60. Did your husband know about that? A. No, it was a bargain between her and I.

“Q. 225. And the child was given about ten days or two weeks after it was born? A. I went to the hospital and got the mother and the child and brought them here.

“Q. 226. The father had nothing to do with the bargain? A. No.

“Q. 227. And, as far as you know, doesn't know anything about it? A. Yes.

“Q. 261. I put it, she couldn't pay you the board while you were keeping her and you made a new bargain in which she agreed to give you the child? A. When she couldn't pay.

“Q. 262. And that is four or five years before the child went to Toronto? A. Yes.

“Q. 263. How can you claim anything for board if you made a new bargain?

“Mr. Ball: Is not that a question for His Honour?

“A. When they gave us the child, and took her away, wouldn't you expect board?

“Q. 264. You should have asked Mr. Ball that. You say the original arrangement was to pay \$2.50 a week, and she was unable to pay, and she arranged with you, you should keep the child for good? A. Yes.

“Q. 265. And that was made three or four years before the child was returned to Toronto? A. No, shortly after we had her.

“Q. 266. Then it would be seven or eight years before? A. Yes.

“Q. 267. This is correct, isn't it? A. Yes.

“Q. 268. You are not going back on that? A. No.

“Q. 269. And you never asked her for money? A. No.”

A brother-in-law of the women, who was a witness for the plaintiff, gives this version of the matter as he says it was related to him by the female defendant:—

“His Honour: If he has had any conversation he knows of? A. Mrs. Forfar told me she made an arrangement with Mrs. Childs to keep the youngster for so much a week, and her husband was no good and wouldn't pay her anything, and she had to pay her own hospital bill, and she finally gave Mrs. Childs the youngster to keep, and she was finished with her husband.

“Q. 428. Was anything said about paying Mrs. Childs? A. She agreed to pay \$2.50 a week and couldn't keep it up, and turned the youngster over to Mrs. Childs.”

And the plaintiff himself made his position in this action very plain, in these words:—

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"Q. 527. There is no agreement to pay board after that?
A. Certainly not, after. The youngster was given to us.

"Q. 528. You understood that? A. If I adopt a child I don't expect you or any one else to pay for it.

"Q. 529. Why didn't you keep the child? A. I made this trip to Toronto and Mrs. Childs, and the child was left there at their request.

"Q. 530. I don't see how you have any board and maintenance? A. I would sooner have the child than all the money he has got.

"Q. 531. Why don't you? A. I was not the father of the child and guess he can keep the child.

"Q. 532. That is some explanation why you didn't ask him for the money? A. I had Mr. Ball ask for it.

"Q. 533. Not until after the law trouble? A. Yes, because I expected Forfar was man enough to pay for it.

"Q. 534. You swore you adopted the child? A. She gave us the child.

"Q. 555. And that is the same reason why you didn't ask for any board? A. Certainly.

"Q. 535. I suppose that is consistent with the affidavit. In the affidavit filed in the law proceedings? It would be on the strength of that you made this statement in the affidavit that the child was given by her mother about ten days or two weeks after she was born. According to your evidence to-day you have been in error. It would be after her second visit. That is correct there? A. No, there

"Q. 536. Except as to time? A. Yes.

"Q. 537. The child was given to you by the mother? A. Yes.

"Q. 538. And kept on that understanding? A. Yes.

"Q. 539. The father had nothing to do with that? A. The father only spoke to me on one occasion.

"Q. 540. As far as you are concerned he was no party to this arrangement? A. No.

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"Q. 582. And because you couldn't get the child, you are going to make a demand for board? A. Simply ask him to pay for her keep.

"Q. 583. And that is the reason you ask in this action? A. Certainly.

"Q. 584. Then in your statement of claim it is untrue (para. 6) 'that at the time the said Marion Forfar was brought to the plaintiff's home and was left with the plaintiff, the defendants had no home to which the said child could be taken nor

means to support the said child, and the defendants then entered into an agreement with the plaintiff that he would be paid for the support, maintenance, and clothing of the said Marion Forfar?" A. I never made that statement.

"Q. 585. The lawyer made it for you? A. It is not true. I didn't make that statement. That is not true."

Whatever a juror might do sympathetically, it ought to be obvious that he could not conscientiously find that there was ever any kind of actual bargain, expressed or tacit, on the part of the male defendant, to pay the plaintiff anything: that any verdict in the plaintiff's favour must be based upon a fictitious bargain created for the purpose of making him pay: but, though fictions in law have been invented to support actions, fictions in fact never have been and never can be.

The plaintiff failed to prove any kind of legal liability on the part of the male defendant to him, and distinctly proved that there never was any; so his action should have been dismissed except for the consent given by the defendant at the trial in these words:—

"Q. 707. And you think you ought to pay them what is fair for the keep of it? A. Sure.

"Q. 708. His Honour: What do you think is fair? A. I thought about \$200.

"Q. 709. His Honour: For the whole time? A. Over and above what we had given them."

In the face of this consent, I cannot understand why this appeal was brought: the consent is not to pay \$200, but is to pay "what is fair:" and, having regard to all the evidence, it cannot be considered that the amount awarded is not "fair."

Therefore I am in favour of dismissing this appeal.

RIDDELL, J.:—This is an appeal by the defendant Harold Forfar from the judgment of the County Court of the County of Oxford.

Mrs. Childs and Mrs. Forfar are sisters; the latter was a stenographer, earning \$15 to \$18 a week; marrying young, she found herself *enceinte*; she and her husband had no house, no provision for the coming child. She told Mrs. Childs that her husband wanted to send the child, when it should be born, to a friend's at Englehart, and pay \$2.50 per week for its support, but that she objected to the proposition; and she asked her sister to stick to her, to help her.

The child was born in Toronto in 1911; the two sisters arranged, shortly after its birth, to take the child to Woodstock, to the plaintiff's house, and did so. Mrs. Forfar desired to carry

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on her profession of stenographer and had to arrange about the baby. There is ample evidence justifying the finding of the learned County Court Judge, which I adopt:—

“I find that the defendant Florence Forfar agreed to pay \$2.50 a week to the plaintiff for the care of the said child soon after its birth; but that she found she was unable to pay this amount, and then agreed that the plaintiff should keep the child; and that the defendant Harold Forfar agreed to this arrangement, as the defendants were not keeping house, and Mrs. Forfar continued her work as a stenographer during the period for which the plaintiff claims for maintenance.”

The appellant and his wife did not take up housekeeping until 1918; and then they had the wife's father take the child away from the plaintiff; and took her into their own house.

There is no evidence of an express promise on the part of the defendant Harold Forfar to pay for the support of his infant child—and he seeks to avoid the judgment against him on that ground.

But, knowing of the arrangement made by his wife, and approving of it, as he must be held to have done, he must be considered bound by what she agreed to. I am of opinion that, under all the circumstances, there was an implied contract on his part that, if he should take away the child under his paternal powers, he should reimburse the plaintiff for the maintenance of the child.

We cannot, indeed, apply the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 27—*Re Davis* (1900); 18 O.L.R. 384—but the Legislature there seems to indicate such a duty as I have indicated.

I am, however, of the opinion that even without this the plaintiff should recover.

It is true that by the common law of England there is no civil liability on the parent to support his child, “unless, indeed, the neglect to do so should bring the case within the criminal law:” *per Cockburn, C.J., in Bazeley v. Forder* (1868), L.R. 3 Q.B. 559, at p. 565; *Mortimore v. Wright* (1840), 6 M. & W. 482; *Urmston v. Newcomen* (1836), 4 A. & E. 899; *Fluck v. Tolle-mache* (1823), 1 C. & P. 5.

It is also true that the statutory Poor Law of England, which imposed this duty, was not introduced into this Province—the statute of Upper Canada (1792) 32 Geo. III, ch. 1, by sec. 6, expressly providing for the exclusion of “any of the Laws of England respecting the maintenance of the poor or respecting bankrupts.”

But certain duties are imposed by the Criminal Code—sec.

241 providing that any one "who has charge of any other person unable by reason . . . of . . . age . . . to withdraw himself from such charge, and unable to provide himself with the necessities of life, is . . . under a legal duty to supply that person with the necessities of life," has been authoritatively interpreted as imposing upon a father the duty of providing necessities for his young children: *Rex v. Lewis* (1903), 6 O.L.R. 132, 7 Can. Crim. Cas. 261; *Rex v. Yuman* (1910), 22 O.L.R. 500, 17 Can. Crim. Cas. 474. (Section 241 of the present Code is in the same words as the original Code of (1892), 55 & 56 Vict. ch. 29, sec. 209). He might, indeed, be excused if he had no means for the purpose: *Rex v. Yuman*, supra; but the evidence here is to the contrary.

Moreover, to neglect to supply the child with necessities would be an offence at the common law: Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 907—"It is an indictable misdemeanour at common law to refuse or neglect to provide food or other necessities for . . . a child . . . unable to provide for and take care of himself, whom the party is obliged by duty . . . to provide for." See *Rex v. Friend* (1802), R. & R. 20. And that the mere relation of father was enough to impose such duty is indicated by Lord Russell of Killowen in *Regina v. Senior*, [1899] 1 Q.B. 283, at p. 292, which was approved in *Rex v. Lewis*, 7 Can. Crim. Cas. at p. 269, 6 O.L.R. at p. 142.

However it would have been at the common law or elsewhere, both reason and binding authority shew it to be a duty now in this Province.

It is text-book law that when any one does for another what that other might be legally compelled to do, both request and promise to pay are implied.

In the present case, the fact that the child which the defendant should legally have supplied with necessities was, with his full knowledge and consent, supplied with them by the plaintiff, in itself provides in law all the elements of a contract.

The amount allowed is not too much on a *quantum meruit*. The appeal should be dismissed.

MIDDLETON, J.:—While it is the law that there is no civil obligation on the part of a parent to maintain his infant child (*Bazeley v. Forder*, L.R. 3 Q.B. 559), his undoubted moral obligation to do so makes it very easy to find an implied promise to remunerate any person who, at his request or with his knowledge, undertakes to discharge this moral obligation for him: *Latimer v. Hill*, 35 O.L.R. 36, 26 D.L.R. 800, 36 O.L.R. 321, 30 D.L.R. 660.

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In this case I think the trial Judge rightly found an implied promise to pay, and the appeal should be dismissed.

LENNOX, J.:—I am of opinion that upon the facts appearing in this case the plaintiff is entitled to recover. This is all that is involved in the appeal. As to the liability of a father for the care or support of his child independently of contract, express or implied, I refrain from the expression of an opinion.

Appeal dismissed.

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[APPELLATE DIVISION.]

Nov. 4

REX v. WEBER.

Criminal Law—False Pretences—Verdict of Jury—Absence of Intent to Defraud—Acquittal—New Trial.

Upon the trial of the defendant upon an indictment for obtaining money by false pretences, the jury found the defendant "guilty of obtaining money by false pretences without intent to defraud:"—

Held, that the finding was in law a verdict of "not guilty," and it should have been so recorded.

It would not be proper to order a new trial, if the Court had power to do so.

CASE stated by the Chairman of the General Sessions of the Peace of the County of Simcoe for the purpose of having determined by the Court a question arising upon the trial of the defendant upon an indictment for obtaining money by false pretences.

The trial was by the Chairman and a jury of the county. The jury found the defendant "guilty of obtaining money under false pretences without intent to defraud." The Chairman considered the finding to be a verdict of "guilty," but reserved for the consideration of the Court the question whether the defendant should be convicted, or acquitted, or whether there should be a new trial.

October 19. The case was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ., and FERGUSON, J.A.

W. H. Wright, K.C., for the prisoner, contended that the finding of the jury, that the accused was "guilty of obtaining money under false pretences without intent to defraud,"

amounted in fact and in law to a verdict of "not guilty." *Regina v. Gray* (1891), 17 Cox C.C. 299, is authority to shew that upon the law there should be an acquittal, and the facts in this case demanded the application of the law more completely than in that one. He also referred to *Rex v. Hunt* (1918), 13 Cr. App. R. 155; *Rex v. Secombe* (1917), 12 Cr. App. R. 275; *Rex v. Ferguson* (1913), 9 Cr. App. R. 113.

Edward Bayly, K.C., for the Crown, urged that there should be a re-trial under sec. 1018 of the Criminal Code, contending that under that section even an acquittal could be set aside. He further contended that, upon consideration of the facts in this case, the jury's verdict could not be considered an acquittal. On the question of the jury's verdict, he referred to *Rex v. Betchel* (1912), 5 D.L.R. 487, at p. 498, 19 Can. Crim. Cas. 423, at p. 425.

Wright, K.C., in reply.

November 4. MEREDITH, C.J.C.P.:—The verdict of the jury, "Guilty of obtaining money under false pretences without intent to defraud," was in law a verdict of "not guilty," and it should have been so recorded, but was not.

The record in the Court of General Sessions of the Peace should be amended accordingly, and the accused acquitted of that particular charge: there are other charges yet untried.

A new trial is out of the question, if there were any power to grant it. The man has been once in jeopardy, and has been found "not guilty" because he had no intent to defraud.

The case was not a common one of that which is commonly called "padding a pay-sheet." According to the finding of the jury, the misrepresentation in the pay-sheets as to the person entitled to the money in question was not meant to defraud, because there was another person or other persons entitled, or to become entitled, to it, and it was paid or to be paid, to them.

Though it has been found to be no crime in this case, it was a very irregular and improper thing to do: and one which was more than likely to put the doer of it in the jeopardy which the accused has passed through unconvicted; but, it is to be hoped, with an experience which may keep him and others from putting themselves in a like jeopardy in the future.

RIDDELL, J.:—A case reserved, under sec. 1014 of the Criminal Code, by His Honour the Judge of the County Court of the County of Simcoe, as Chairman of the General Sessions of that county.

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The defendant was indicted for obtaining money under false pretences; the jury found him "guilty of obtaining money under false pretences without intent to defraud," and the learned Chairman construed the verdict as one of "guilty."

It is apparent that, unless there was something, in the Judge's charge or elsewhere, shewing that the words of the jury are not to be taken in their ordinary and common meaning, the finding was one of "not guilty;" one and an essential element, the intent to defraud, is negatived: sec. 405 of the Criminal Code.*

But it is suggested that the charge of the Judge gives a different meaning to these words, and it is therefore necessary to scrutinise with care his precise language.

He begins by defining the crime alleged as including "having fraudulent intent," and dwells somewhat upon the intent; then, pointing out the contention of counsel for the defendant, "that the element of fraud, the intent to defraud, is absent," he says, "It is for you to say whether Weber was honest and believed that he was doing right," and adds: "Paying the money back afterwards would not help him, if the act of obtaining the money by false pretences was committed with intent to defraud." He says, "It is a matter of law what the intention was, whether the intention was to defraud," and, "I would be glad to receive your views as to whether Weber . . . had the intention of defrauding the county." Then he adds: "I would ask you to consider your verdict, and if your opinion is that Weber actually acted in good faith and got this money for the purpose of paying these men afterwards, that there be a recommendation for leniency in sentencing the accused, I will deal with him considering the matter . . . If you think that Weber got the money in good faith, recommendation to mercy, it will be duly considered in passing sentence."

This seemed to leave it as a charge to the jury that the offence was complete on the defendant obtaining the money by false pretences, that the intent to defraud was a question of law, that nevertheless they were to find the intent for the assistance of the Court in determining the sentence. The jury retired, and, while counsel for the defence was raising some objections, the following occurred:—

*405. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.

“The Chairman: In *Rex v. Weber*, the jury have handed me a note asking for further instruction. (To the jury): I received your note from your foreman, Mr. McLean, asking for instructions in giving the verdict, in the case of obtaining money without intent to defraud. . . . If your unanimous view is that the accused has obtained money under false pretences, without intent to defraud, if that is your view, will you so state?”

The jury followed instructions and returned with a verdict: “Guilty of obtaining money under false pretences without intent to defraud.”

I can find nothing to indicate that the jury did not say precisely what they meant under the charge; and the error of the Chairman in supposing that the intent to defraud was a matter of law for him, and not a matter of fact for them, should not prejudice the defendant.

I think the verdict was a verdict of acquittal, and can find nothing to justify a re-trial on this charge.

LATCHFORD, J.:—I agree that the verdict is in effect a verdict of "not guilty." Had it been so recorded, as it should have been, the accused could not again be tried on the same charge. Therefore a new trial should not be ordered.

MIDDLETON, J., and FERGUSON, J.A., agreed with RIDDELL, J.

Verdict of acquittal to be entered.

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Sept. 22.
Nov. 4

Distress—Liability of Landlord for Act of Bailiff—Absence of Ratification.

The defendant, landlord, issued his warrant to his bailiff to distrain the goods and chattels of his tenants; and the bailiff seized goods upon the demised premises which the plaintiff had sold to the tenants, by a conditional sale under the Conditional Sales Act. The bailiff declined to give up the goods, and the defendant did not direct him to do so. The plaintiff sued in detinue and trover:—

Held, there being nothing to evidence or indicate any ratification of the seizure by the defendant, that he was not liable.

Gauntlett v. King (1857), 36 B.N.S. 59, not followed.

Freeman v. Rosher (1849), 13 Q.B. 780, and subsequent cases, followed.

Perring & Co. v. Emerson, [1906] 1 K.B. 1, distinguished.

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THIS action was brought in the County Court of the County of York to recover certain goods claimed by the plaintiff as his property and which, as he alleged, were wrongfully seized and detained from him by the defendant.

September 15. The action was tried in the County Court by WISMER, Co.C.J., without a jury.

J. P. MacGregor, for the plaintiff.

M. H. Ludwig, K.C., for the defendant.

September 22. WISMER, Co.C.J.:—The defendant is the owner of a building in the city of Toronto, and certain persons, named Batchelor and Wilson, were his tenants of part of this building. These tenants had purchased some articles of office furniture from the plaintiff, and had placed them in their office in the defendant's building. The tenants fell in arrear with their rent, and their landlord placed in the hands of a firm of bailiffs, Wood & Co., a distress warrant authorising them to distrain the goods of the tenants upon the said premises for the said arrears of rent.

The bailiffs entered upon the said premises and distrained the goods in question and took possession of them. The goods have not been sold, but are still in the possession of the bailiffs. The plaintiff, who had received only \$100 on account of the purchase-price of the said goods, demanded possession of the said goods from the bailiffs, alleging that they were his property; that the condition of the sale was that the property in them should remain his until paid for. The bailiffs refused to give up possession without instructions from the defendant. A letter was then written on behalf of the plaintiff to the defendant demanding possession, but no reply was sent to this letter.

Subsequently, the defendant, upon being called up by the plaintiff's solicitors by telephone, referred them to the bailiffs, without either refusing or consenting to the delivery of the goods. Nothing further was done by the defendant. He gave no instructions of any kind to the bailiffs apart from the distress warrant itself, took no part in the distress; and there is no evidence that he was on the premises when the distress was made, or that he had in any way interfered with the goods. It was contended on behalf of the plaintiff that the neglect or refusal of the defendant to instruct the bailiffs to give up possession of the goods was sufficient in itself to make him responsible.

The law applicable may be found in Woodfall on Landlord and Tenant, 18th ed., p. 600, set forth as follows:—

“In the case of an illegal distress, the action should be

brought against the person actually committing the illegal act, and not against the landlord, unless it can be shewn that he expressly authorised the act or adopted and ratified it afterwards, of which his presence on the premises immediately after the committal of the wrongful act is evidence, though the mere receipt of the proceeds without proof of knowledge of the illegal act is not so."

In Halsbury's Laws of England, vol. 11, p. 204, para. 408, the law is set forth in similar language.

In *Goldberg v. Rose* (1914), 19 D.L.R. 703, a case decided in the Supreme Court of Alberta, it was held that "the landlord who has merely authorised a lawful distress for rent is not liable for the seizure by his bailiff of goods not subject to distress unless he has in some way confirmed such seizure."

I cannot find anything upon the above statement of facts to justify me in holding that the defendant authorised the seizure or detention of the plaintiff's goods, or that he ratified or adopted it in any way. He apparently deliberately kept clear of interfering in any way, probably relying on the bailiffs knowing their business. It was stated at the trial that the bailiff who made the seizure belonged to the firm of Wood & Co., who carry on business as bailiffs, and as such should know more about matters of this kind than the defendant.

For the above reasons, I think the action should be dismissed with costs.

The point raised by the defence was that as a matter of fact and law the plaintiff had no lien on the goods in question. In view of my conclusion as to the other branch of the case, it is not necessary for me to determine that point."

The plaintiff appealed from the judgment of the County Court.

October 21. The appeal was heard by RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

MacGregor, for the appellant, contended that at common law the goods of a stranger are liable to distress by the landlord, if upon the landlord's premises: Woodfall on Landlord and Tenant, 20th ed., p. 542; that the only modification of that common law rule applicable to Ontario is contained in the Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 31, by which the landlord is given the right of distress on the interest of the purchaser (his tenant) under a conditional sales agreement, and by that statute the goods in question claimed by the plaintiff were distrainable by the landlord and were therefore within the terms of the war-

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rant to the bailiffs. The amendment to the Conditional Sales Act (6 Geo. V. ch. 24, sec. 23) provides simply a means whereby the landlord may realise upon this right of distress, and does not repeal the right of distress upon the interest of the tenant in conditionally sold goods given by sec. 31 (*supra*) to the landlord. In fact that amendment recognises the right to distrain and provides the machinery for adjusting the rights of both landlord and vendor in such goods. It follows then that the goods were properly distrained by the bailiff and improperly held by the landlord through his bailiff, because the landlord did not obey the provisions of the amendment to the Conditional Sales Act by paying off the vendor. The case of *Perring & Co. v. Emerson*, [1906] 1 K.B. 1, is in point because the seizure there made was not protected by special enactment and was therefore treated as a common law seizure. So also the case of *Goldberg v. Rose*, 19 D.L.R. 703, is decided upon the fact that the chattel in question was not distrainable—just the converse of this case.

Ludwig, K.C., for the defendant, respondent, contended that the defendant had nothing whatever to do with the conduct of the bailiffs, because the goods seized were outside the warrant. He relied upon the trial judgment and the case-law cited therein.

MacGregor, in reply.

November 4. The judgment of the Court was read by RIDDELL, J.:—The plaintiff had sold, under the Conditional Sales Act, certain goods to Batchelor and Wilson, who were tenants of the defendant. The defendant issued his warrant to Wood & Co., “my bailiffs . . . Distrain the goods and chattels Batchelor and Wilson, the tenant,” etc. Wood seized the goods mentioned and declined to give them up. The defendant did not direct Wood to give the goods to the plaintiff, and the plaintiff sued the landlord in “detinue and trover.” The trial Judge dismissed the action, and the plaintiff now appeals.

We may, I think, disregard the circumstances other than as set out above. There is nothing to indicate, much less to evidence, any ratification by the defendant of the seizure; and the sole question is as to the liability of the defendant for the act of his bailiff.

The case of *Gauntlett v. King* (1857), 3 C.B.N.S. 59, does, in my view, support the contention that the landlord is liable if his bailiff seizes goods of the tenant which are in law exempt from seizure, and I do not think it was decided upon any ground of detaining goods illegally seized, as is suggested in Halsbury's Laws of England, vol. 11, p. 204, para. 409. I do not find *Gauntlett v. King* followed in any subsequent case, and the law as laid

down in *Freeman v. Rosher* (1849), 13 Q.B. 780, seems to have been uniformly followed.

Becker v. Riebold (1913), 30 Times L.R. 142, accepts the principle that the landlord is not liable in such cases without subsequent ratification, and the cases *Carter v. Vestry of St. Mary Abbots Kensington* (1900), 64 J.P. 548, and *Burns v. Guardians of St. Mary Islington* (1911), 56 J.P. 11, take that law for granted.

The case referred to by me on the argument of *Perring & Co. v. Emerson*, [1906] 1 K.B. 1, where the landlord was held liable, will be found to depend upon the express provision of the statute (1888) 51 & 52 Vict. ch. 21, which, by sec. 7, enacts that not only an uncertificated bailiff, but also his employer, is liable in trespass for any seizure. This was to prevent any distress by a bailiff without the proper certificate.

I think the appeal fails and must be dismissed.

Appeal dismissed with costs. J

[APPELLATE DIVISION.]

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Contract—Agreement of Defendant with Mother of Child to Pay her Weekly Sum for its Support—Statute of Frauds—Evidence of Adulterous Intercourse between Mother and Defendant—Inadmissibility—Presumption of Legitimacy—Liability of Mother to Support Child—Consideration for Promise to Support Legitimate Child—Criminal Code, sec. 242—Contract against Public Policy—Action Brought by Married Woman in Maiden Name.

That the plaintiff, a married woman, sued in her maiden name, was *held*, not a ground for defeating her action.

The plaintiff, alleging that she had had, while cohabiting with her husband, illicit intercourse with the defendant and had borne him a child, sued him upon an alleged agreement to pay her a weekly sum for the support of the child:—

Held, that the contention that the agreement was void as against the Statute of Frauds was untenable—the child might or might not live for more than a year.

The evidence of the plaintiff should not have been received to bastardise her child.

There was no admissible evidence that the child was illegitimate, and it must be taken that the plaintiff's husband was the father.

Thus, upon the plaintiff's story, the defendant had agreed to pay her for the support of her legitimate child; but primarily the obligation to support a legitimate child is on the father; and, there being nothing to indicate that the plaintiff was liable to support her child, the support was consideration for the promise on the part of the defendant to pay (MIDDLETON and MOWAT, JJ., *dubitantibus*).

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But a contract by a third party to pay the mother for the support of a child alleged by her to be the result of adultery with him while she was living with her husband, is against public policy and void.

And the judgment of a County Court in favour of the plaintiff was, on that ground, reversed.

Per MIDDLETON, J.:—Under the Criminal Code, sec. 242, both parents are liable to punishment for failure to maintain the child.

Per MOWAT, J.:—The child being legitimate, the judgment might well be reversed on the ground that there was no consideration to support a promise to pay for its maintenance; and the evidence as to the promise was frail and fragmentary.

AN appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff for the recovery of \$312 and costs.

The action was based upon a promise or agreement, said to have been made by the defendant, to pay for the maintenance of the plaintiff's infant child, of which the defendant was, as the plaintiff alleged, the father, although the child was born in wedlock, the plaintiff alleging that she had illicit intercourse with the defendant while living with her husband.

The plaintiff, although a married woman, sued in her maiden name.

The action was tried by one of the County Court Judges without a jury; and judgment was given for the plaintiff for \$312, calculated on the basis of \$6 a week from the 1st July, 1920, until the date of the judgment.

October 20. The appeal was heard by RIDDELL, LATCHFORD, and MIDDLETON, JJ., FERGUSON, J.A., and MOWAT, J.

C. P. Tisdall, for the appellant, contended that the plaintiff had improperly sued in her maiden name, she being a married woman, and also that the contract alleged was void by the Statute of Frauds. He further argued that the plaintiff's evidence should not have been received, as it tended to make her child illegitimate: *Nottingham Guardians v. Tompkinson* (1879), 2 C.P.D. 343; *Burnaby v. Baillie* (1889), 42 Ch. D. 282; and that if such evidence had not been admitted the plaintiff could not have succeeded.

S. J. Birnbaum, for the plaintiff, respondent, on the question of consideration, referred to *Smith v. Roche* (1859), 6 C.B.N.S. 223; Halsbury's Laws of England, vol. 2, p. 441, para. 750, note (t); *James v. Morgan*, [1909] 1 K.B. 564. On the question of admissibility of evidence, he referred to Powell on Evidence, 10th ed. (1921), p. 124; Best on Evidence, 11th ed. (1911), pp. 354, 355; the Evidence Act, R.S.O. 1914, ch. 76, sec. 8.

Tisdall, in reply.

November 4. RIDDELL, J.:—The facts of the case are as simple as they are disgusting. The plaintiff, a married woman (who sues in her maiden name), says that she had, while cohabiting with her husband, illicit intercourse on many occasions with the defendant; that she bore to him a child; and that he agreed to pay her \$6 a week for the support of the child.

At the trial evidence was given which convinced the learned County Court Judge that the facts were truly as set out above, and he gave judgment for the plaintiff for \$6 a week from the 1st July, 1920, till the date of the judgment, with costs. The defendant appeals.

We disposed of certain grounds of appeal upon the argument: the first, viz., that the plaintiff sued in her maiden name, is obviously untenable. Any one, in law, is entitled to take any name which he can induce others to call him by, although such a course may be evidence of fraud: *Du Boulay v. Du Boulay* (1869), L.R. 2 P.C. 430; *Cowley v. Cowley*, [1901] A.C. 450. The second, that the alleged contract was void as against the Statute of Frauds, is equally untenable—the child might or might not live for more than a year. All the cases from *Peter v. Compton* (1693), Skin. 353, 1 Sm. L.C., 11th ed., p. 316, down to *Reeve v. Jennings*, [1910] 2 K.B. 522, agree that such a case is not within the statute—*McGregor v. McGregor* (1888), 21 Q.B.D. 424 (C.A.), is a case not unlike the present.

It was contended that the evidence of the plaintiff should not have been received to bastardise her child, and I agree. The many cases cited in Taylor on Evidence, 10th ed., sec. 950, and Wigmore on Evidence, sec. 2063—to which I add *Nottingham Guardians v. Tomkinson*, 2 C.P.D. 343, and *Burnaby v. Baillie*, 42 Ch. D. 282—shew that, on grounds of public policy, neither spouse can be allowed to give evidence of non-access to prove the illegitimacy of the offspring. It is true that the rule as laid down by the cases does not go so far as to exclude the evidence given in the present case, but the same grounds of decency, morality, and public policy are as valid in this case as in those.

I think, therefore, that it has not been proved by admissible evidence that the child is illegitimate, and that the ordinary presumption of law must be applied. "*pater est quem nuptiæ demonstrant*"—a useful rule both in the civil, the canon, and the common law—see *Hargrave v. Hargrave* (1864), 9 Beav. 552.

The result is that the defendant agreed to pay the plaintiff \$6 a week for the support of her legitimate child. Had the child been illegitimate, as contended by the plaintiff, there is respectable if not binding authority for the statement that an agreement on her part to support the child would be no consideration in

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law: *Crowhurst v. Laverack* (1852), 8 Ex. 208. But primarily the obligation to support a legitimate child is on the father, and not the mother: Eversley on Domestic Relations, 3rd ed., p. 539. There is nothing to indicate that the plaintiff was liable to support her child. I think, therefore, that the support by the plaintiff of the child was consideration for the promise on the part of the defendant to pay. I can find no illegality in the consideration.

Were there nothing more in the case, we should have the somewhat interesting but not wholly unprecedented result that if we should give effect to the contention of the plaintiff she would fail, but giving effect to the contention of the defendant he would be rendered liable.

But the whole story is so revolting as at once to indicate to any decent mind that there must be something illegal in the contract. Whatever might be the result were the case but one of a third party agreeing with the mother to support a child, against whose legitimacy nothing could be said, I cannot but think that a contract by a third party to pay the mother for the support of a child which she claims to be the result of adultery with him while she was living with her husband, is absolutely against public policy, as it is against public decency. Such a contract is one which the Courts could not undertake to enforce.

For this reason (which was not argued before us or at the trial) I would dismiss the action. There should be no costs to either party in this disgraceful affair.

LATCHFORD, J., agreed in the result.

MIDDLETON, J.:—I agree in the result, and desire only to add that I entertain some doubt as to there being consideration for the promise. Under the Criminal Code, the "parents" are liable to punishment for failure to maintain the child. See *Flint v. Pierce* (1912), 170 N.Y. St. Repr. 1056.

FERGUSON, J.A., agreed in the result.

MOWAT, J.:—I think the appeal in this detestable case should be determined only upon the case and defence made at the trial.

The plaintiff, a married woman and mother of the infant, seeks to fasten liability upon the defendant, her paramour, by reason of an alleged promise to pay for the maintenance of the child. But the child was born in wedlock, and this Court might well adhere to the salutary presumption that the child is therefore legitimate. *Filiatio non potest probari*. The mother should not

have been allowed to state in the witness-box that the child was not that of her husband: *Aylesford Peerage* (1885), 11 App. Cas. 1; *Burnaby v. Baillie*, 42 Ch. D. 282. In any event her (and all) evidence as to its paternity is unsatisfactory and inconclusive. The presumption cannot be displaced by a mere balance of probabilities. Illegitimacy is not proved.

If then the child is legitimate, there is no consideration to support a promise to pay for its maintenance; and the evidence also as to the promise is frail and fragmentary. The Illegitimate Children's Act is not applicable to the facts here, but it is to be noted that the Act is confined to children not born in wedlock, and the Act must be taken to be declaratory of what was understood to be the common law.

It is not necessary for me to dissociate myself from the majority of the Court, who find that any promise was void as against public policy, but the appeal may well be allowed upon the ground I have stated.

Appeal allowed.

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[APPELLATE DIVISION.]

REX v. MEHARG.

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Criminal Law—Procedure at Trial—Indictment for Murder—Instructions Given by Presiding Judge to Jury in Jury-room—Consent of Counsel—Waiver of Prisoner's Right to be Present during whole of Trial—Criminal Code, sec. 943—Substantial Wrong or Miscarriage—Sec. 1019.

On the trial of the prisoner for murder, after the jurymen had retired to consider their verdict, they sent a message to the presiding Judge that they wished to know whether the foreman could have a private hearing with the Judge or the Crown-Attorney. The request was communicated by the Judge to counsel for the Crown and for the prisoner, and, after discussion, it was agreed and consented to by both counsel that the Judge should visit the jury in their room, unaccompanied by counsel, but taking with him the registrar and the court-stenographer. This arrangement was carried out, and the Judge, in the jury-room, gave further instruction to the jury in answer to a question put by one of the jurymen. The proceedings in the jury-room were recorded by the stenographer. A verdict of "guilty" was then given. Upon a case stated by the Judge for the opinion of the Court:—

Held, applying the provisions of sec. 943 of the Criminal Code, that the prisoner had the privilege of being present during the whole of the trial, but he might waive that privilege, and the waiver by his counsel, in his presence and acted upon, was his waiver (HODGINS, J.A., *dubitante*); also there was (subsec. 2) substantially a permission by

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the Judge for the prisoner to be out of court during the time of the proceedings in the jury-room—the Judge did no more than adjourn the court to the jury-room.

Rex v. Rogers (1903), 6 Can. Crim. Cas. 419, referred to.

Held, also, that no substantial wrong or miscarriage was occasioned by what was done: sec. 1019 of the Code.

HODGINS, J.A., was not satisfied that counsel, in cases of felony, have the right to bind the prisoner by waiver.

CASE stated by MULOCK, C.J. Ex., before whom and a jury Wilfrid Meharg was tried at Hamilton, in October, 1921, upon an indictment charging him with the murder of Edward J. Whitworth on the 23rd December, 1920.

The prisoner was found guilty, and the case stated by the Chief Justice was upon four questions of law arising upon the trial.

Questions 1, 2, and 3 were as to whether certain evidence was properly admitted and as to whether there was nondirection or misdirection in the charge to the jury.

Question 4 was stated by the Chief Justice as follows:—

“After the jury had retired to consider their verdict, they sent to me, while on the Bench, a memorandum in the following words: ‘The jury wishes to know if the foreman of the jury can have a private hearing with the Judge or the Crown-Attorney.’

“I submitted the request in open court to the counsel for the Crown and for the prisoner, stating at the same time that there could be no communication either by myself or the Crown-Attorney with the foreman of the jury. Thereupon the request was discussed by both counsel and myself, and by common consent I sent word to the jury that, if they desired it, I would visit the jury in their room, but that no communication could be held with the foreman only. The registrar, who took this message to the jury, returned with the message that the jury would appreciate it if I would go to their room, and I invited counsel on both sides to accompany me. Mr. Ballard, one of the counsel for the defence, suggested that I should go unaccompanied by either counsel, and I told them that I would do so, taking with me the registrar and the court-stenographer. The three of us then proceeded to the jury-room, and the proceedings occurring therein are correctly set forth in the notes of evidence, as follows:—

“*Proceedings in jury-room:*—

“Foreman: We weren’t just sure—I suppose I am allowed to tell you how many of us agree and how many do not agree.

“His Lordship: I cannot close your mouths; you can take any course you like.

“Foreman: There is eleven of us agree in one thing and one

is not agreed and he said if we stay here for a year he won't change his mind.

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"His Lordship: A case of eleven very obstinate.

"Foreman: I think it is a case of one obstinate man; every man is entitled to—

"Juryman: I am the one man: I understood you to say if a juryman thought a man didn't kill him and shoot him with the intention of killing him he could bring it in manslaughter.

"His Lordship: If you thought it was an accident?

"Juryman: Yes.

"Foreman: This is the thing, my Lord; this gentleman agreed with me when I put the question that he thought that Meharg shot at the man probably to wound him or scare him, and I told him, as I understand the law and as you directed us, if the man died from the wound then it was murder; is that so? He told me he thought Meharg may have shot at the man the second time to wound him so he would let go of Dickenson; he thinks that would be manslaughter; he don't think it is murder if by that wound the man died—if the man didn't have any direct intention of killing him at the time.

"Juryman: If I thought he had no intention of killing him, I think it is manslaughter, no matter whether he shot at him or not.

"His Lordship: Do you want me to tell you what is the law?

"Juryman: I certainly do.

"His Lordship: If, under the circumstances of this case, according to the version given by the prisoner that is, he went into that room to assist in the robbery; that Dickenson had gone around the counter intending to rob; that Dr. Whitworth turned around, saw him and resisted, and if at that period the prisoner fired that second shot intending that it should hit Doctor Whitworth, and Dr. Whitworth having since died of the wound, that would be murder.

"Juryman: You could bring it in any other things?

"His Lordship: Not according to your oath.

"Juryman: I understood you to say—

"His Lordship: Not according to your oath; if he intended to wound him with a bullet; that is a reckless shooting and it would stamp his act as a wrongful intentional act.

"Juryman: I give in—I am wrong.

"His Lordship: The intention to do wrong is the distinction; where there is an intention to wound, cause grievous bodily harm such as here, that may prove fatal, that takes it out of the category of accident.

"Juryman: I have my own belief.

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“Foreman: That is the question we wanted; if we cannot agree now.

“His Lordship: You have agreed now.

“Foreman: You tell me you are agreeable.

“Juryman: When I know I am wrong I give in in a second.”

(a) Was I wrong in so visiting the jury-room and instructing the jury therein as shewn in the notes of evidence?

(b) If I were wrong, was any substantial wrong or miscarriage, within the meaning of sec. 1019 of the Criminal Code, occasioned thereby?

November 9. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

T. J. Agar, for the prisoner.

Edward Bayly, K.C., and *Daniel O’Connell*, for the Crown.

Questions 1, 2, and 3 were answered by the Court unfavourably to the prisoner.

Agar, upon the 4th question, argued that the learned Chief Justice of the Exchequer was wrong in visiting the jury-room and there instructing the jury, in the absence of the prisoner, even with the consent of the prisoner’s counsel. Consent could not give jurisdiction. Reference should be made to *O’Connor v. Guthrie & Jordan* (1860), 11 Iowa 80; *Campbell v. Beckett* (1858), 8 Ohio St. 210; *Hoberg v. State of Minnesota* (1859), 3 Minn. 262; *Fish v. Smith* (1859), 12 Ind. 563. The learned Chief Justice himself doubted whether it was right for him to go into the jury-room. Substantial wrong was occasioned, in that the Chief Justice had given a wrong direction to the jury while in the jury-room.

MEREDITH, C.J.O. (at the conclusion of the argument for the prisoner):—We think it is not necessary to hear counsel for the Crown in this case.

We have already dealt with the first three questions and have indicated our view as to them. The 4th question is the one that has just been argued.

Section 943 of the Criminal Code provides: “Every accused person shall be entitled to be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.” And sub-sec. 2 provides that “The court may permit the accused to be out of court during the whole or any part of any trial on such terms as it thinks proper.”

What occurred was that the jury required some further instruction, and counsel for the prisoner suggested that the learned Chief Justice, who was presiding, should himself go into the jury-room and there answer the inquiries of the jury. Counsel for the Crown did not think that that was the proper course, and ultimately it was arranged that the Chief Justice, with the court-stenographer and the registrar should go into the jury-room and ascertain what the jury wanted and answer such questions as they desired to ask. That was carried out, and there is a transcript of all that took place in the jury-room, which has been read.

Now, I think, in the first place, that the prisoner, under the Code, is entitled to be present, that is, has the privilege of being present, during the whole of the trial, but that that privilege he may waive; and the waiver by his counsel, in his presence and acted upon, was his waiver.

Then sub-sec. 2 also may be applied: there was substantially here a permission by the court for the accused to be out of court during the time that this was taking place in the jury-room, if in fact it was out of court.

Then was what the Chief Justice did any more than adjourning the court to the jury-room? I think that that was all that it amounted to; he might have adjourned to some other room, he might have adjourned to some other place in the county for part of the trial.

In *Rex v. Rogers* (1903), 6 Can. Crim. Cas. 419, the head-note is as follows:—

“1. At the trial of an indictable offence, the presiding judge may, with the consent of counsel for the Crown and for the prisoner respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness who is too ill to be moved therefrom and may order that the court and jury proceed there for that purpose.

“2. The prisoner is bound by the consent of his counsel in such a matter which does not go to the jurisdiction of the court.”

Of course that case does not touch the question of going into the jury-room, with which I have already dealt. What in fact was done was to make the jury-room the court-room for the time being; the prisoner chose to be absent from it, or was permitted to be absent from it, and his counsel voluntarily absented himself. So that this question must be answered against the prisoner.

If I had come to a different conclusion, I would have held that sec. 1019 was clearly applicable. There was, in my opinion, no substantial wrong or miscarriage in what was done. All that was

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done was done with the assent of the prisoner's counsel: what took place there in no way prejudiced the prisoner.

While we are answering all these questions against the prisoner, there is no doubt that the course adopted is one that ought not to be followed: it is an undesirable one, and it was unfortunate that the Chief Justice—as he himself recognises—fell in with the suggestion of counsel that he should go into the jury-room to answer the questions which the jury desired to ask. I have no doubt that in future no Judge will adopt that course.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A. :—I would like to say that I prefer to rest my judgment upon the last ground mentioned by my Lord the Chief Justice, and that is, that no substantial wrong or miscarriage has occurred. I am not satisfied that counsel, in cases of felony, have the right to bind the prisoner by waiver. But here, even on the assumption that what was done was wrong, a full transcript of what actually occurred was kept by an officer of the Court, and Mr. Agar has had the opportunity of arguing from that transcript that some legal wrong was done to the prisoner by the direction as to the law of the case. We have decided against him on that point, and nothing further appears to have taken place that would in any way prejudice the prisoner.

Conviction affirmed.

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[IN BANKRUPTCY.]

1921.

RE FAIRWEATHERS LIMITED.

Nov. 11.

Bankruptcy—Assignment by Insolvent Company to Authorised Trustee in Ontario—Claim of City Corporation in Quebec for Water Rates and Business Taxes in Respect of Business Premises in City—Claim to Priority over Ordinary Creditors—Disallowance by Trustee—Appeal by City Corporation—Reference to Quebec Court—Question of Quebec Law Involved—Bankruptcy Act, secs. 51(6), 71(2) — Effect of Removal of Goods of Company from Quebec Premises to Ontario after Assignment.

Once the Court of a Province is seised of a bankruptcy matter, no Court in any other Province will be permitted to intervene in the proceedings or to interfere with the administration of the insolvent estate, except under the order of the Court so seised.

Stewart v. Le Page (1916), 53 Can. S.C.R. 337, applied and followed.

An incorporated company, having its chief place of business in Ontario, made an authorised assignment under the Bankruptcy Act to a trustee in Ontario. It had a branch business and business premises in the city of M., in the Province of Quebec, and the corporation of that city filed with the trustee in Ontario proof of a claim against the company for a sum of money for water rates and business taxes in respect of those premises. The city corporation, under sec. 51(3) of the Act, claimed priority over ordinary claims, and the trustee disallowed that claim. On appeal to the Judge in Bankruptcy from the disallowance, the city corporation asked for an order transferring the proceedings to a Bankruptcy Court in the Province of Quebec:—

Held, that, as the appeal of the city corporation involved a question of Quebec law, an order should be made, under sec. 71 (2) of the Act, referring the appeal to the Judge in Bankruptcy for the Province of Quebec exercising jurisdiction in the city of M., including the right to either party to appeal from his decision to the proper Court of that Province.

The decision in *Re F. E. West & Co.* (1921), 50 O.L.R. 631, did not necessarily govern the decision of the city corporation's claim to priority, for regard must be had to the local statutory provisions for the realisation of the rates and taxes imposed.

Semble, if the goods of the company upon the premises in M. had been removed by the trustee into Ontario, the removal should not be allowed prejudicially to affect preferential rights in existence at the time of the assignment, even though such rights depended for their full enforcement upon the continuance upon the premises of the goods of the company until actual seizure.

MOTION by the Corporation of the City of Montreal by way of appeal from the ruling or decision of an authorised trustee under the Bankruptcy Act, to whom Fairweathers Limited, an insolvent company, had made an assignment.

November 5. The motion was heard by ORDE, J., in Chambers.

Orde, J.

1921.

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WEATHERS
LIMITED.*T. N. Phelan*, for the Corporation of the City of Montreal.*R. S. Cassels*, K.C., for the authorised trustee.

November 11. ORDE, J.:—The City of Montreal, in the Province of Quebec, through its treasurer, filed with the trustee proof of a claim against the insolvent company for \$2,900 for water rates and business taxes for 1921, in respect of the business premises at 487 St. Catherine street west, Montreal, which had been occupied by the Montreal branch of the insolvent company prior to its assignment under the Bankruptcy Act. Of the \$2,900, the sum of \$1,200 is for water rates and \$1,700 for business tax. The city claims priority over ordinary claims under sub-sec. 6 of sec. 51 of the Bankruptcy Act,* and the trustee has disallowed the claim to priority, on the ground that the movable goods of the insolvent had come into the hands of the trustee before any seizure was made.

From this disallowance the city now appeals, and also asks for an order transferring the proceedings to the Bankruptcy Court in Montreal, in order that the questions involved may be determined there. The trustee opposes the application to transfer the matter to the Bankruptcy Court in Montreal, and urges that the issue can be determined more satisfactorily by the Bankruptcy Court in Ontario, which, by reason of the location of the head office of the company, and the making of the assignment, in this Province, is the Court primarily charged with jurisdiction over the insolvent estate.

That once the Courts of one Province are seised of the matter, no Court in any other Province will be permitted to intervene in the proceedings or to interfere with the administration of the insolvent estate, except under the order of the Court so seised, is clearly established by the judgment of the Supreme Court of Canada in *Stewart v. Lee Page* (1916), 53 Can. S.C.R. 337, 29 D.L.R. 607, a decision upon those provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, sec. 125, which correspond to sub-sec. 2 of sec. 71 of the Bankruptcy Act.† See also *Brews-*

* (6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

† (2) All courts having jurisdiction in Bankruptcy in all Provinces of Canada and the officers of such courts respectively shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and in proceedings under authorised assignments, and an order of the court seeking aid, with a request to another of the said courts,

ter v. Canada Iron Corporation (1914), 7 O.W.N. 128. So that, except in the enforcement of a lien or charge upon property of the insolvent company still locally situate in the Province of Quebec, where the right to proceed independently of the administration in bankruptcy is preserved to the creditor by sub-sec. 1 of sec. 6, the Courts of the Province of Quebec have no power to entertain or adjudicate upon the claim of the City of Montreal in this case, without an order of this Court obtained under sec. 71 (2).

It therefore becomes a question whether or not, in the exercise of my judicial discretion, it will be more reasonable, in view of all the circumstances, that I should attempt to try the question here or remit it to the Quebec Court for that purpose.

It was urged by Mr. Cassels that my judgment in *Re F. E. West & Co.* (1921), 50 O.L.R. 631, in which, *inter alia*, I held that, in the existing state of the legislation of this Province, the City of Toronto was not entitled to any preference or priority under sub-sec. 6 of sec. 51 for business taxes, rendered it unnecessary to refer the matter to the Quebec Court, or to deal with the appeal otherwise than on the footing of that case. But this contention overlooks the fact that my judgment was based upon the omission, as I regarded it, from the legislation of this Province of any provision which, by virtue of sub-sec. 6, gave to a municipality any preference for business taxes which could be enforced after the bankruptcy had intervened. But the expression "business tax" may mean entirely different things in different Provinces, and my decision was not intended to mean, and cannot be interpreted as meaning, that the mere appellation of "business tax" to some particular form of impost excludes it from the operation of sub-sec. 6 in every Province, and without regard to the local statutory provisions for its realisation.

In the present case the goods of the insolvent upon the premises in question are admitted to have been sufficient to answer the liability for the taxes claimed, had a seizure been made by the city before the insolvent company assigned to the trustee. And the city contends that under the law of the Province of Quebec it was entitled nevertheless to collect the water rates and the business tax in question, either in spite of or by virtue of sub-sec. 6 of sec. 51. This necessarily involves a question of Quebec law;

shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

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and, if the circumstances were such that the duty of dealing with that question were cast upon me, I should be obliged to deal with it in the ordinary way, by hearing evidence as to the law of Quebec and dealing with such evidence as a matter of fact rather than of law. This procedure, at all times unsatisfactory, would be particularly so where the question is to some extent a technical one, involving the consideration possibly of the Civil and Municipal Codes of the Province of Quebec and the charter of the City of Montreal. In such a case it will clearly be much more satisfactory to have the application of the law of Quebec to the question in issue dealt with by the Courts of that Province, rather than by the unsatisfactory method, which for lack of a better one, the Courts of one country are forced to adopt when dealing with the laws of another. In my judgment, sub-sec. 2 of sec. 71 is particularly adapted for just such cases as this, and it would be difficult to suggest a more appropriate occasion for resorting to the benefit of its provisions than the present one.

It was not made quite clear to me whether or not, after the assignment, the goods of the insolvent upon the premises in question had been removed by the trustee from the Province of Quebec into the Province of Ontario. If so, the trustee may desire to contend that, assuming that in spite of the assignment the city still had the right by law to seize goods found upon the premises in question, the removal from the premises or from the Province before seizure has affected the city's preferential claim. While that question might, perhaps, be reserved for myself to deal with, yet, inasmuch as the question, if raised, may involve some consideration of Quebec law, I think it preferable that my order should not in any way hamper or interfere with the freedom of the Bankruptcy Judge in Montreal to deal with the whole matter involved in the appeal. It may not be amiss to say that it would seem to me to be highly improper that any act of an authorised trustee, such as the removal by him of goods from one Province to another, should be allowed prejudicially to affect preferential rights in existence at the time of the assignment, even though such rights depended for their full enforcement upon the continuance upon the premises in question of the goods of the insolvent until actual seizure. But the question is not yet ripe for any considered judgment of mine upon that point.

There will be an order, under the authority given to me by sub-sec. 2 of sec. 71, referring the appeal of the City of Montreal from the trustee's decision, to the Judge in Bankruptcy for the Province of Quebec exercising jurisdiction in the City of Montreal, including the right to either party to appeal from his deci-

sion to the Appeal side of the Court of King's Bench of that Province.

The costs of this application will go to the party ultimately successful upon the issue involved. The trustee's costs will, of course, be payable out of the estate.

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[APPELLATE DIVISION.]

1921.

COUNTY OF SIMCOE V. SANDERSON.

Nov. 14.
Dec. 23.

Registrar of Deeds—Fees of Office—Percentage Payable to County—Excess of Net Income over Fixed Sum—Deduction of "Disbursements Incident to the Business of the Office"—Registry Act, secs. 101, 102 (8 Geo. V. ch. 27, sec. 18)—Salary of Advisory Clerk—Powers of Inspector of Registry Offices—Revision and Determination of Amount to be Allowed for Disbursements—Sec. 110 of Act—Determination of Inspector—Finality.

The Registry Act, R.S.O. 1914, ch. 124, sec. 101, as amended by the Registry Amendment Act, 1918, 8 Geo. V. ch. 27, sec. 18, provides that every Registrar shall pay to the Treasurer of the county or city for which, or for part of which, he is Registrar, "on the excess over \$6,000, 90 per cent." of his net income, which, by sec. 102, is defined to be "the excess of all fees and emoluments earned during the calendar year after deducting the disbursements incident to the business of the office." The defendant, the Registrar of a county, deducted from his fees for two years a salary paid to a person who had served as Deputy Registrar for many years, and who, being in ill-health and unable to continue to act in that capacity, was appointed by the Registrar to act as advisory or consulting clerk. The plaintiffs, the county corporation, brought this action to recover the sums paid to this officer, alleging that the payments were not proper "disbursements incident to the business of the office." Section 110 of the principal Act provides that the amount to be allowed for the disbursements of a Registrar shall be subject to the revision and determination of the Inspector of Registry Offices:—

Held, that, the Inspector having determined that the allowance of these "disbursements" was warranted in the general interest of the Registry Office and the public requirements, his determination could not be reviewed by the Court.

ACTION by the Municipal Corporation of the County of Simcoe against the Registrar of Deeds for that county, to recover 90 per cent. of the sum of \$1,437.50, the difference between the expenses and disbursements of the defendant's office for 1919 and 1920 as the plaintiffs said they should be, and the amount at which the defendant stated them in his return to the Inspector of Registry Offices.

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The action was tried by MOWAT, J., without a jury, at Barrie.
W. A. J. Bell, K.C., for the plaintiffs.
J. A. Macintosh, K.C., for the defendant.

November 14. MOWAT, J.:—Substantially the dispute is one between the Government of the Province and the municipality on a question of both law and policy. The statutes have therefore to be examined.

Forty-nine years ago the Legislature decided to limit upon a graded scale the personal emoluments of Registrars derived from their fees, and enacted that any surplus over a fixed amount should be paid to the county or city as the case might be. The deductions from fees has increased from time to time to the disadvantage of Registrars and to the advantage of the municipalities.

The Act now governing the shading down of remuneration is the Registry Act, R.S.O. 1914, ch. 124, sec. 101, as amended by the Registry Amendment Act, 1918, 8 Geo. V. ch. 27, sec. 18, under which every Registrar shall pay to the Treasurer of the county or city for which, or for part of which, he is Registrar, “on the excess over \$6,000, 90 per cent.” of his net income, which, by sec. 102, is defined to be “the excess of all fees and emoluments earned during the calendar year after deducting the disbursements incident to the business of the office.”

The Registrar for Simcoe deducted from the fees for 1919 the sum of \$687.50 and for 1920 the sum of \$750, making the total of \$1,437.50, 90 per cent. of which is here claimed by the county. These sums were paid respectively in each year to F. M. Montgomery, who had been for over 40 years employed in the Registry Office, and was for many years, and up to January, 1920, senior Deputy Registrar. This gentleman's health having become impaired in June, 1919, or before, and he being scarcely able ever to go to the Registry Office, the Registrar ceased paying his salary from the 1st October, 1919, but did not dismiss him, owing to his dislike to so treating an official who had such a long period of public service to his credit. The Deputy and his friends complained of this non-payment to the Attorney-General, under whose department the Inspector of Registry Offices performs the duties of his office. The Inspector, Mr. Mallon, with the approval of the Attorney-General, then went to Barrie, the county-town, and had a meeting with the Deputy Registrar and the defendant Registrar, and an amicable arrangement was concluded on the 7th January, 1920, under which the Deputy was to resign his office, and be appointed to a position of ad-

visory or consulting clerk from the 1st October, at a salary of \$750, being one-half his former salary.

Mr. Mallon, the Inspector, was called as a witness at the trial, and said that his reason for suggesting this arrangement was that it would have been harsh to take away the Deputy's means of living after his 44 year's service; but, apart from that, Mr. Sanderson, the defendant, had been appointed only in 1918 and had no previous experience; that, when questions arose as to long abstracts and as to the registration of plans, Mr. Montgomery's long familiarity with the titles and localities in the county would make him valuable as an advising and consulting officer. He had also heard that the second deputy had been complaining of the difficulty of getting help from a Registrar who was unfamiliar with conveyancing and practice. He said that he had these things in mind when he approved of the new position for the deputy.

That these considerations are sufficient to warrant the employment of an official who never since October, 1919, attended the office to work at any duties, met with an emphatic denial and protest from the members of the county council. They asserted that the Deputy had not done a day's work since early in 1919..

It was argued for the plaintiffs that the arrangement made was in reality a method of obtaining a superannuation salary for the debilitated Deputy. And here is the crucial point of the case.

It, no doubt, was uppermost in the mind of the Inspector, and of his chief the Attorney-General, that the Deputy should not be turned adrift without means of livelihood; but there may be sound policy in bringing about just such a substituted appointment, in the fact that rewards for faithful service produce a feeling of loyalty and content in other and fellow-employees, who, if of the belief that their old age will not be spent in perilous poverty, no matter how slender the foundation on which their hope is founded, will apply themselves with greater interest and assiduity to their duties, as well as become more obliging and accommodating to the public. Such treatment as was meted here may be said to be an administrative substitute for the provision for a superannuation Act. There are also the other practical reasons which the Inspector says he had in his mind. And there is evidence that on one occasion the former Deputy was consulted on a problem which presented itself. So, when the Registrar's report of disbursements reached the Inspector, it was inevitable that the inclusion of this salary for the

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new advisory clerk should be "revised and determined," in the exercise of the Inspector's power and duty under sec. 110,* in favour of the item, and of the official. He held that it was "a disbursement incident to the business of the office" (sec. 102); and I am not to sit in appeal from his ruling.

It was suggested that Mr. Mallon did not use his own mind in determining that the item of this salary should be allowed, but was swayed by what he supposed was the wish of the Attorney-General. However, he stated positively in the witness-box, and I think truly, that he acted under the powers of sec. 110 solely on his own initiative, and not under the influence of any other official.

It is to be noted that the enactment which is now sec. 110 provided only for "revision" of the disbursements until the passing of the consolidated Registry Act, 10 Edw. VII. ch. 60, when the word "determined" was added (sec. 109). And this was when the late Donald Guthrie, K.C., was Inspector—a just and competent official.

It therefore is obvious that the Registrar, although the employer, yet is subordinate to the Inspector, who has the determination of the vital question of pay or salary. And, the Inspector having determined that the allowance of these two years' salary was warranted in the general interest of the Registry Office and the public requirements, the plaintiffs are before the wrong Court. The result is not without its advantages, because it is plain that if an action at law may arise every time county councillors differ from the Provincial authorities upon what clerks it is or is not advisable to have in a Registrar's office, then a Registrar's troubles and liabilities will be unduly increased.

Before going to law, the county council might well have written or spoken to the Inspector, and he might have convinced them that his action was not without reason and that he was the statutory arbiter in the matter.

The percentage contribution clauses, being in derogation of the common law right of Registrars, are to be construed strictly: *Re Ingersoll, Gray v. Ingersoll* (1888), 16 O.R. 194.

The action will therefore be dismissed with costs.

The plaintiff appealed from the judgment of Mowat, J.

*110. The amount to be allowed for the disbursements of a Registrar shall be subject to the revision and determination of the Inspector.

December 23. The appeal was heard by MEREDITH, C.J.O.,
MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Bell, K.C., for the appellant.

Macintosh, K.C., for the defendants, respondents.

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THE COURT, at the conclusion of the argument, dismissed the
appeal with costs.

[ROSE, J.]

1921.

GUARDIAN REALTY CO. OF CANADA LIMITED V. JOHN STARK & CO.

Nov. 17.

*Landlord and Tenant—Lease—Option of Renewal—When Exercisable
—Demand for Renewal after Expiry of Term—Tenant Overholding
without Consent of Landlord—Occupation Rent—Double Value.*

The defendants, having an option for the renewal of their lease of
business premises occupied by them, continued in occupation after
the expiry of the term, and demanded a renewal during the month
following the expiry. The lease was silent as to the time when
application for renewal should be made:—

Held, that the defendants' application was not in time.

There must be some limit to the time within which such an option can
be exercised; *prima facie* that time is the time of the continuance of
the relationship created by the lease; and the tenant cannot create
an extension of it by holding over without the consent of the land-
lord.

Review of the authorities.

Brewer v. Conger (1900), 27 A.R. 10, distinguished.

The plaintiffs, the landlords, were awarded possession and declared
entitled to occupation rent, but not to double value, which is not re-
coverable where the retention of possession has been under a *bond
fide* claim of right.

Wright v. Smith (1805), 5 Esp. 203, followed.

ACTION to recover possession of premises let by the plaintiffs
to the defendants.

The action was tried by ROSE, J., without a jury, at a To-
ronto sittings.

K. F. MacKenzie, for the plaintiffs.

R. J. McLaughlin, K.C., for the defendants.

November 17. ROSE, J.:—While the transactions between the
landlord and the tenants concerning the partitions were such as
to indicate that, at the time when they took place, it was prob-
ably the intention of the tenants to exercise their option to take

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a renewal of the lease, there was no formal exercise of the option, and there was nothing to bind the tenants to take the premises for a further term, if, at the expiration of the term of the lease, they did not desire to do so; and the question is, whether they were in time in demanding a renewal when they did, viz., during the month following the expiry of the term. In my opinion, they were not.

Where, as here, the lease is silent as to the time when application for a renewal should be made, it has been said by Bruce, J., in *Lewis v. Stephenson* (1898), 78 L.T.R. 165, 67 L.J.Q.B. 296, that the application for a renewal must be made within a reasonable time before the expiration of the original lease. But this statement by Bruce, J., was *obiter*, and it seems to be clear that there are circumstances in which the application may effectively be made at a later time. Mr. McLaughlin suggests that the right to elect continues as long as the tenant remains in possession; and, except for the question as to the applicability of the decision in *Brewer v. Conger* (1900), 27 A.R. 10, presently to be discussed, I think that the inquiry narrows itself down to the question, whether he is right as to this, or whether there must be something more than a mere continuance in possession.

Foa, Landlord and Tenant, 5th ed., p. 307, suggests that the right to a renewal will not be lost if the tenant continue in possession after the end of the term, with the sanction of the landlord; and Foa's language is adopted by one of the Judges in *Allen v. Murphy*, [1917] 1 I.R. 484, at p. 490.

Masten, J., in a case in which what was under consideration was an option to purchase, expressed the view that the reasonable time within which the option was to be exercised was the term of the lease and the time thereafter during which the relationship of landlord and tenant *on the terms of the lease* should continue: *Bennett v. Stodgell* (1916), 36 O.L.R. 45, 61.

Several cases were cited to me by counsel in which the right had been held to be exercisable after the expiry of the term, by a tenant who continued in possession. It is not necessary to consider whether in each of them the possession was on the terms of the lease, so as to bring the case exactly within the rule stated by Masten, J.; for every one of them was at least within the rule as stated by Foa—the possession was with the sanction of the landlord—and none of them, in my opinion, supports the broad proposition suggested by Mr. McLaughlin. Even in *Hersey v. Giblett* (1854), 18 Beav. 174, the last of the successive years for which the tenant had been given possession was still current when, in February, 1853, the tenant gave no-

tice of his desire for a new lease (see pp. 178 and 179): the statement, in the statement of case, that the application was in April, differs from the statement in the judgment of Sir John Romilly; and, even if the statement in the statement of case is accepted, it does not appear that the application was not made before the 19th April, on which day the term came to an end.

For these reasons, I think that, unless the contrary is decided in *Brewer v. Conger*, 27 A.R. 10, the plaintiffs are entitled to possession.

The decision in *Brewer v. Conger* seems to me to depend entirely upon the peculiar language of the covenant which the Court had there to construe, and to be quite inapplicable to the case in hand. It was a case, not of the simple option which we have here, but of a covenant to "grant . . . another lease . . . for a further period . . . provided the lessee . . . should desire to take a further lease . . . ;" and what the Court held was that, as the desire existed, the lessee could enforce performance of the covenant, although no demand for another lease had been made until some months after the expiration of the term; and it is to be noted, although, perhaps, the Court did not treat this as an essential, that the desire was known to the lessor's solicitor during the term: see p. 14.

This decision, in my opinion, has no bearing upon the question whether a simple option, such as the one in the case in hand, can be exercised after the expiration of the term, when there is nothing, other than the mere overholding by the lessee, upon which to base the contention that the right to exercise it still exists. There must be some limit to the time within which such an option can be exercised; *primâ facie* that time is, I think, the time of the continuance of the relationship created by the lease; and there seems to be nothing in the cases cited to justify a holding that the tenant can create an extension of it by holding over without the consent of the landlord.

The landlord must be awarded possession, and declared entitled to retain, as occupation rent, the rent, at the increased rate, which has been paid, and, by arrangement between the parties, has been accepted without prejudice to the landlord's claim to possession. But the landlord is not entitled to the double value which is claimed; that double value is not recoverable where, as here, the retention of possession has been

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under a *bonâ fide* claim of right: *Wright v. Smith* (1805), 5 Esp. 203.

The defendants must pay the costs.

[This judgment was reversed by the First Divisional Court of the Appellate Division on the 30th January, 1922: see 21 O.W.N. 373. The reasons for the judgment of the Divisional Court will be reported in due course.]

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Nov. 18.

[APPELLATE DIVISION.]

MILLAR v. THE KING.

Solicitors—Retainer by Crown—Claim for Value of Services—Purchase by Ontario Government of Undertakings of Power Companies—Validating Act, 6 Geo. V. ch. 18—Services of Solicitors in Searching Titles and Carrying out Purchase—Necessity for Work Done—Copy of Docket Entries Sent by Solicitors to Minister of Crown without Addition of Charges—Statement Subscribed and Signed as Bill—Charges for Items Added by Independent Solicitor—"Bill of Costs"—Solicitors Act, sec. 34—Rule 668—Agreement between Solicitors and Crown—Sec. 49 (1) of Act—Order in Council Directing Payment by Hydro-Electric Commission—Petition of Right—"Action"—Judicature Act, sec. 2 (a)—Interpretation Act, sec. 30—Evidence—Letters Written by Secretary and Member of Commission—Admissibility—Effect—Fiat of Attorney-General—Position of Commission—Debt of Commission—Absence of Appropriation by Legislature.

The judgment of Middleton, J., 49 O.L.R. 93, was affirmed (MEREDITH, C.J.C.P., and LATCHFORD, J., dissenting).

Held, per RIDDELL and LENNOX, JJ., that the statement sent by the solicitors (the plaintiffs) to the Minister of Lands Forests and Mines, being a detailed and itemised account of the work done, subscribed and signed by the solicitors, with a request that the appropriate charge for each item should be fixed by an independent solicitor, which was done, was a sufficient bill of costs within the meaning of sec. 34 of the Solicitors Act; that the work done by the solicitors could not be objected to as unnecessary (RIDDELL, J., hesitating as to this); and that there was ample evidence to support the judgment as to quantum.

Per KELLY, J.:—No sufficient reason was shewn for disturbing the judgment of MIDDLETON, J.

Per LENNOX, J.:—The bill, with the added charges, having been adopted by the Minister, and payment having been directed by an order in council, the Crown was liable for the amount of the bill. The control, responsibility, and duty were still vested in the Crown, and nothing had happened to detract from the force or effect of the order in council.

Per MEREDITH, C.J.C.P., and LATCHFORD, J.:—A petition of right is an "action" within the definition in sec. 2 (a) of the Judicature Act, applied to the Solicitors Act by sec. 30 of the Interpretation Act.

(2) The statement of services delivered to the Minister by the solicitors could not be regarded as a "bill of costs" within the meaning of the Solicitors Act.

(3) No such agreement was made as (under sec. 49 (1) of the Solicitors Act) obviated the necessity of delivering a bill of costs. The order in council was not a contract, and it was never acted upon or given any effect. It was no more than a direction to the Hydro-Electric Commission to pay the claim.

Per MEREDITH, C.J.C.P.:—Upon the merits of the case, so far as they had been disclosed, the solicitors had no valid claim—the services that they rendered, or the greater part of them, the searching of titles, were unnecessary. But the question whether they were unnecessary, or otherwise not taxable under Rule 668, had not been tried, and should be tried in the ordinary way by the taxing officer. The onus of proof for some reasonable need for the expenditure was upon the solicitors.

(2) Two letters which were put in at the trial, one written by the secretary of the Commission to one of the solicitors and the other by a member of the Commission, who was also a member of the Government, to the Minister of Lands Forests and Mines, if admissible as evidence, did not help the case of the solicitors.

(3) The solicitors were not relieved from rendering a bill, and from a taxation in the usual course, by the fiat of the Attorney-General authorising the taking of the proceedings now before the Court, commenced by a petition of right.

(4) There was no agreement on the part of the Crown to pay; for there was no means to make payment—no appropriation had been made by the Legislature, and no appropriation had been applied for.

(5) The debt—if there was a debt—was not that of the Province at large, but that of the Central Ontario Power System, administered by the Commission, which is not a mere servant or agent of the Government, but a distinct corporate body, given the control and ownership of such things as those in question, for the public benefit.

AN appeal by the Crown from the judgment of MIDDLETON, J., 49 O.L.R. 93.

May 4. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, KELLY, and LENNOX, JJ.

Edward Bayly, K.C., for the appellant, denied that there was in fact any agreement to pay the bill of costs in question, between the suppliants and the appellant. He further contended that the statute 6 Geo. V. ch. 18, sec. 3, vested in His Majesty the King the properties mentioned in that Act free from all charges and incumbrances, and therefore the work done by the suppliants was unnecessary, and consequently the suppliants had no legal claim in respect of them. He further denied that the views of the Minister of Lands Forests and Mines, or of the Hydro-Electric Commission's secretary, or of the then Attorney-General, acting as a member of the Commission, as expressed in letters by these various persons, affected the rights of the parties to the action: *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited* (1909), 18 O.L.R. 275. The appellant was entitled to have the bill taxed in the ordinary way. No bill of costs as required by the Solicitors Act, sec. 34, was ever rendered, nor had this

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requirement ever been in any way waived. The suppliants were not entitled to bring an action without previously delivering a proper bill: *Gundy v. Johnston* (1913), 28 O.L.R. 121, 12 D.L.R. 71, 48 Can. S.C.R. 516. Counsel further argued that there was nothing in the nature of a binding agreement by the appellant to pay the suppliants any specific sum. No approval by order in council was ever given of any bill of costs or any contract as required by the Executive Council Act, sec. 6. The order in council of the 4th November, 1918, could not be treated as an agreement, because it was unilateral, and could have been withdrawn at any time without the consent of the suppliants.

W. N. Tilley, K.C., and *T. R. Ferguson*, K.C., for the suppliants, respondents, argued that, in the circumstances, the bill was a sufficient compliance with the Solicitors Act. They also contended that the work done was necessary and had been ordered by the proper authority. The statute 6 Geo. V. ch. 18 merely vested in the Province such titles as the vendors had. Again the order in council was an agreement in writing to pay the solicitors, and so complied with the requirements of the Executive Council Act, sec. 6, and with the provisions of the Solicitors Act, secs. 48 to 66. Counsel also contended that this proceeding was not an action, being a petition of right: *Rustomjee v. The Queen* (1876), 1 Q.B.D. 487; and also that the solicitors were relieved from rendering a bill and from taxation by the fiat authorising the taking of these proceedings, as well as by the fact of the agreement between the parties: *Canadian Domestic Engineering Co. Limited v. The King*, [1919] 2 W.W.R. 762; *Belcourt v. Crain* (1910), 22 O.L.R. 591.

Bayly, K.C., in reply, contended that this proceeding was an action, and referred to sec. 30 of the Interpretation Act, R.S.O. 1914, ch. 1, in support of this contention.

November 18. RIDDELL, J.:—The firm of Millar Ferguson & Hunter had been employed by the Crown, through the former Minister of Lands Forests and Mines, in the investigation of titles, etc., in respect of the property acquired under 6 Geo. V. ch. 18 (Ont.)

The work being completed, a bill was sent in, but not in the usual form. Mr. Ferguson, the member of the firm who had most to do with the work, had become a Justice of Appeal, and he determined the form of the bill, for reasons which I give in his own words:—

“The Minister of Lands Forests and Mines has the same name as my own: the public think we are relatives. We are not relatives, but we have been very close personal friends, and I con-

sulted very closely with him about this. I say I appreciated he was the Minister—I did not want to render him a bill and put him in the position of saying it was too large, or paying it, and having him in the position of somebody else saying it was too large, so I sent it to him and asked him to have it fixed by somebody else, so there would be no question.”

With this reasoning operating, the bill was sent in, in the form mentioned in the judgment appealed from—it should, however, be noted, that the bill was subscribed, “This is our bill herein,” and signed by the firm. I am of opinion that, under all the circumstances, this was equivalent to saying to the client: “We are sending you the items of our bill—the amount of our bill is the amount which will be fixed by some independent person”—and, when the solicitors agreed to Mr. Kilmer as such independent person, it was equivalent to saying, “The amount of our bill is what Mr. Kilmer will fix.”

Except by the merest technicality, the case stands as though the bill was delivered with the amount to be fixed by Mr. Kilmer expressed as the amount of the bill. Of course, had it only been the gross amount to be fixed without regard to items, we could not hold this bill sufficient, in view of our decision in *Gould v. Ferguson* (1913), 29 O.L.R. 161, 12 D.L.R. 71—see also *Lynch-Staunton v. Somerville* (1918), 44 O.L.R. 575, 46 D.L.R. 748—but, considering what was intended, and, I may add, what was actually done by Mr. Kilmer, I think that the bill was, in effect, rendered with the fee for each item which Mr. Kilmer should fix. *Id. certum est quod reddi certum potest*—and it seems to me that, when Mr. Kilmer went over the items and applied the County of York tariff of costs to these items, he was fixing the amount at which the bill was rendered as respects these items, and that he was doing precisely what the solicitors intended and expected.

The object of a bill of costs is “to secure a mode by which the items of which the total sum was made up, should be clearly and distinctly shewn, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not:” *per* Archibald, J., in *Wilkinson v. Smart* (1875), 33 L.T.R. 573, 575; *Gould v. Ferguson*, 29 O.L.R. at p. 163. This object was fully attained by the method adopted—and I think that what was done was a compliance with the Act.

In this view, it is not necessary to consider whether a petition of right is an “action” within the Solicitors Act—as at present advised I do not assent to the proposition that it is not, but I give no opinion on the point.

With some hesitation, I think that the work done cannot be

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objected to as unnecessary—and there is ample evidence to support the judgment as to *quantum*.

I would dismiss the appeal.

KELLY, J.:—On a careful consideration of this case, I can see no sufficient reason for disturbing the judgment of the trial Judge: the appeal should, therefore, in my judgment, be dismissed.

LENNOX, J.:—I am of opinion that the judgment appealed from ought not to be disturbed. There was nothing shewn that would lead me to think that the work done was unnecessary; and, although the point was taken, it did not appear to me that counsel supporting the appeal had much faith in it. The real question for decision is: are the plaintiffs debarred from bringing an action, a petition of right in this case, by reason of non-compliance with sec. 34 of the Solicitors Act, R.S.O. 1914, ch. 159?

The bill rendered contained a full and explicit statement of the services, transactions, and items for which payment is claimed, the amounts disbursed set out in detail in every instance, and was subscribed and signed as required by the Act. The amounts claimed for the various services were not set out, but the bill was accompanied by a letter suggesting that instead of this the Minister should select and appoint an independent person to fix and determine the sums fairly and properly payable in respect of the services referred to and set out in the account, and the total amount payable in respect of the account.

The department was not bound to adopt this suggestion, but it was adopted. Mr. Kilmer was appointed, and, after a full and careful examination of the petitioners' books and records and full inquiry—in all of which he was facilitated and assisted by the petitioners—determined upon the fair and reasonable sums payable in respect of the various services, and the total of these sums, and reported this to the department. The petitioners stood by this determination, as they had agreed, and the department also adopted it, and it was accordingly approved by an order in council and payment directed.

It is idle to talk of the control and responsibility having passed into other hands. The control, responsibility, and duty are still vested in the Crown, unaffected, unfettered, and unimpaired, and nothing has happened to detract from the force or effect of the order in council referred to.

I would dismiss the appeal.

MEREDITH, C.J.C.P.:—In these proceedings, the respondents,

a co-partnership firm of law solicitors, are seeking to enforce payment of a claim of \$31,589.13 for professional services, mainly in searching a great number of titles—about 730—of different parcels of land comprised in that which was called the Central Ontario Power System.

The more substantial objection to the claim is: that the services said to have been rendered were unnecessary, and should not have been performed; and, therefore, that the solicitors have no legal claim, nor indeed any reasonable claim, in respect of them.

But that question has not been tried; and, if the judgment appealed against is not set aside, this Court will compel payment of this very large claim without having tried the case.

That would be objectionable enough under any circumstances, but would be exceptionally objectionable in this case, as those who must pay, if the judgment stands, are the public who are served by this power system; and they are not parties to this action, and have had no opportunity of being heard in it.

Throughout these proceedings Mr. Bayly, acting for the appellant, nominally the Crown, actually the Government of the Province, has consistently and persistently taken and held to the ground: that the solicitors must render a bill of costs and submit to a taxation of their bill in the ordinary way, as the law requires; and, upon the trial of this action, he refused to call witnesses, or to cross-examine witnesses, except for the purpose of making his position clear: and sought judgment, by way of nonsuit, in accordance with his contention: and so too upon this appeal; even refusing to express any opinion upon the solicitors' claims until their bill should be rendered.

When these circumstances appeared upon this appeal, the impropriety of compelling payment without any real trial of the case, or any taxation of the bill, seemed to me to be so manifest that I at once proposed a taxation of the bill, deeming it of little or no importance who was right or who was wrong upon the question of rendering a bill before an action; and asked what possible objection there could be to that course being then adopted; but received no answer other than that the solicitors would not consent.

It was then, and still is, impossible for me to imagine any good reason why that course should not have then, or should not be now, adopted, and this avoidable litigation brought to an end.

If the solicitors' claim is lawful and right, they cannot lose, but must gain, by a taxation; their costs of it should be paid; and they should be saved from any possible imputations of having recovered that large amount of money by unusual methods—

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without rendering a bill and without a taxation, to which ordinarily all solicitors must submit, and without any real trial of the action.

Whilst, if it should be found that they are not entitled to that which they claim, either in whole or in part, no one should, and I am sure no one could, desire more than they to know it.

In the absence of any consent, I am in favour of directing that the solicitors bring in a bill, and that it be taxed in the usual way, this appeal being retained here until the result of the taxation is made known: that is the course which, in my opinion, the trial Judge should have taken; and the only reasonable and possible way of doing justice to those who have to pay, as well as those who are to receive, and a way in which no one has yet been able to shew any fault.

But if that is not to be done; if strict rights, better named sheer obstinacy, are to prevail, then, for more than one reason, this appeal should, in my opinion, be allowed and the action dismissed.

It ought not to be needful—but it seems to be—to say: that it is a plain and prime duty of a solicitor to save his client from needless litigation and needless costs.

The law is a *terra incognita* to the client; the lawyer is supposed to be familiar with it, and offers himself as a safe guide therein: the relationship of solicitor and client is necessarily of a very confidential character: the solicitor must take all reasonable means to guide his client safely; necessity compels the client to submit to the solicitor's guidance: care must be taken not to lead into pitfalls.

The duty of a solicitor to save his client from needless costs should be so obvious, to lawyers and laymen alike, that there should hardly be need for Rules of Court upon the subject, but there are Rules, confirmed by legislation, and they are quite in accord with that which every one's common sense should make plain.

Rule 667 provides that:—

“Between party and party the Taxing Officer shall not allow the costs of proceedings:

“(a) Unnecessarily taken;

(b) Not calculated to advance the interests of the party on whose behalf the same were taken;

“(c) Incurred through over-caution, negligence or mistake; or

“(d) Which do not appear to have been necessary or proper

for the attainment of justice or defending the rights of the party."

And Rule 668 provides that:—

"Upon a taxation between a solicitor and his client, the Taxing Officer may allow the costs of proceedings taken which were in fact unnecessary where he is of the opinion that such proceedings were taken by the solicitor because, in his judgment, reasonably exercised, they were conducive to the interests of his client, and may allow the costs of proceedings which were not calculated to advance the interest of the client where the same were taken by the desire of the client after being informed by his solicitor that they were unnecessary and not calculated to advance his interests. This rule shall not apply to solicitor and client costs payable out of a fund not wholly belonging to the client, or by a third party."

And to these Rules may be added sec. 55 of the Solicitors Act, in these words:—

"A provision in any such agreement that the solicitor shall not be liable for negligence or that he shall be relieved from any responsibility to which he would otherwise be subject as such solicitor shall be wholly void."

Having this general view of a solicitor's relationship and duty to his client in mind, it is necessary that the material facts of this case be now stated and the law applied to them accordingly.

Unfortunately, the retainer of the solicitors is not in writing, though generally it should be, and in such cases as this, under provincial legislation, must be signed by the Minister of the provincial Government who made it: The Executive Council Act, R.S.O. 1914, ch. 13, sec. 6.

No defence, however, is based upon this enactment; on the contrary, a retainer is admitted: the difficulty is to find, in the absence of any such writing, just what the retainer was: but the solicitors, at all events, cannot object if their own statement in writing, at the time, as to it, be accepted as that which they understood it to be.

On the 1st April, 1916, they wrote to the Hydro-Electric Power Commission: that, "as the Commission knew," they had received instructions from the Government to search the real estate titles of the properties which were being acquired under the contract between the Electric Power Company and His Majesty the King, dated the 10th March: and, in the same letter, shew their appreciation of their duty in these words: "It seems to me that, with your knowledge and inventory, arrangements ought to be made to check off now with your list the properties

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and assets that are being handed over and that your officers or employees who made this list would be better able to do the checking than any person else. When this is done, or as it is done, the *persons doing the checking should send a particular description of each parcel of real estate of which the title requires to be searched and certified by me.*”

That is to say, that such titles as the Commission found it necessary to have searched, the solicitors were to search, on receiving a particular description of each parcel from the Commission.

It should have been impossible, even without this statement of the solicitors, to have believed that the retainer could have been any wider than to make all necessary searches: the Minister could not have meant, make searches whether necessary or not; nor could the solicitors, having regard to their duty, have accepted any such retainer, as it was not the Minister, but the ratepayers of the system, who must pay. It is obviously impossible that the solicitors had authority from the Minister to run up a bill of tens of thousands of dollars, if there were really nothing substantial to be gained by it: so it may be taken that the retainer was: to make such land title searches as should be necessary and proper: and, as I have stated, if extravagant and useless proceedings were authorised by the retainer, the solicitors could not recover the costs of them except under the provisions of Rule 668, that is, in this case, from the person who authorised them, and then only if the solicitors had informed him that they were not necessary and not calculated to advance his interests.

It does not appear that the Commission ever sent to the solicitors “any particular description” of any parcel “of which the title requires to be searched:” and no reason has been given for going into the extremely unusual expense incurred in this case, without such an authorisation from them as furnishing such “description” might be. To the contrary of having received any such authorisation, the solicitors now take the extraordinary position that the Commission had no right to do, or to say, anything with regard to the matter except to pay their bill, and collect the amount of it from the ratepayers—that is, the public, who are now served through the Commission with electricity from the Central Ontario system.

The material circumstances affecting the case are few and unquestioned or unquestionable: the Government of this Province, pursuing the popular policy of public ownership of provincial water-powers suitable for generating electricity, and of the development and public distribution of electricity through the Hydro-Electric Power Commission, acquired, from private

ownership, through a number of companies which had forestalled public ownership in the Trent district, all the property and rights of such companies, by contract; and thereupon, under powers conferred by legislation, granted to and vested in the Commission all of them, to be managed by them as a separate department or branch of the business of the Commission.

The contract to purchase was made by the then Minister of Lands Forests and Mines, and was signed by him as representing His Majesty the King—in plainer language, this Province: and in and by that contract—which was, as the law before mentioned requires, in writing—it was agreed and provided that “The purchaser accepts the title of the vendor to all the said premises.”

That contract was confirmed by legislation, 6 Geo. V. ch. 18, sec. 2, in these words: “The agreement which . . . is set out in schedule A to this Act, is hereby confirmed and declared to be legal, valid and binding upon the parties thereto.”

The Act also, in sec. 3, vested in the Province, free from all liens, charges and incumbrances, save as provided in the contract of purchase, “All and every part of the property, assets, rights, contracts, privileges, licenses, franchises, undertakings and businesses dealt with or purported to be dealt with, or agreed to be purchased or sold under the terms of the said contract set out in schedule A.”

This provision, plainly giving an absolute title to all the property bought, accounts for that which otherwise would be an extraordinary provision of the contract, that is, the provision accepting the title of the vendors: usually (need it be said?) the vendor must prove his title.

But it is contended, and has indeed been held by the trial Judge, that that which the Legislature so plainly said is not that which it really meant: that that which it meant was only to vest in the Province such titles, whether good or bad, as the vendors actually had.

That view seems to me to be plainly erroneous, for these reasons: it is contrary to the plain words of the Legislature, which no Judge or Court has any power to disregard or modify, however strong a feeling there may be that the Legislature should not have said them. We are all bound to treat the Legislature as a body quite able to express its meaning, and a body which means that which it says: and, without qualifications, it has given to the Province a clear title to all and every part of the property comprised in the agreement to purchase, and has directed that that title be registered against each parcel: sec. 8: it would be useless if it had no such meaning—if it meant only such rights as the vendors had in the property—for all that was comprised

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in the agreement to sell, and that agreement had already, in the Act, been declared legal, valid, and binding on the parties thereto: if it were to be so limited, sec. 3 should, and would, have contained the usual, the invariable, words, "for all the estates, rights, titles, and interests of the vendors therein and thereto," or the like words: and it was necessary, in the interests of this "public utility," and could do no real harm to any one; it was necessary to save the system from interruption, from being "held up," as it is commonly called, by the cantankerousness or cupidity of some person who had, or pretended to have, some title to or interest in some of the property needed and used for the convenient working of the system: a person who might, either by injunction or by himself abating that which he deemed a nuisance as to his rights, interrupt the whole system, and in even a short time cause great and widespread injury: whilst, on the other hand, no harm could be done; the person, if he had a good claim, should and would be fully compensated for all that the enactment took from him; and that should and would be done, whether the Government were or were not bound by the law to make compensation: as to which *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Limited*, [1919] A.C. 744, and *Attorney-General v. De Keyser's Royal Hotel Limited*, [1920] A.C. 508, afford much information: and it may be added that every one is familiar with and accustomed to such legislation as this, of which *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited*, 18 O.L.R. 275, and *Smith v. City of London* (1909), 20 O.L.R. 133, were the earlier popular lessons. So too it may also be added that the Naboths who resist confiscation for the benefit of another individual are of quite a different species from those who resist "confiscation" in order to "confiscate" from the public "three or four prices" for property, when without such an opportunity they would be glad to sell for "one price."

If the Province thus got a statutory title, there would be no need to go behind that, except in such cases, if any, in which compensation might be claimed, and no one has said that there have been any such.

But, even if the statute does not confer such a title, yet what need, for any practical purpose, could there be for searching any of these titles except for the purpose of dealing with a claim for compensation when it was made? And the simple and ordinary method in such a case would be to look at the books, deeds, and other papers which the Commission have, and, if any further search of title were necessary, obtain from the proper registry office such further information as might be needed, at a very small cost. It must be borne in mind that the companies from whom the Province bought had purchased and doubtless had

investigated the titles, and had handed on to the Commission all the documents in connection with them: this is referred to in the solicitors' letter, from which I have quoted, in these words: "The purchase was recommended and your Commission spent thousands of dollars investigating the assets and properties of the vendors and have a list or inventory of the properties to be transferred."

It is idle to speak of liability incurred by the solicitors: they would be liable for negligence only; and, even if guilty of the greatest negligence, how could substantial damages be recovered against them? Their answer to such an action would be: "You have sustained no damages by our negligence, you did not accept title on our opinion. You had accepted title, whether good or bad, before you retained us."

The onus of proof of some reasonable need for this expenditure was manifestly upon the solicitors, but they made no attempt to meet it: their proof was that the prices charged were reasonable: so that the case, if the judgment stands, would be parallel to that of goods sold and delivered on a contract to supply only such goods as were necessary, the tradesman having alone knowledge of the quantity needed, met by a defence that the goods were not needed and were wasted, yet recovering in a Court of law upon a reply: that anyway the prices were right and he had proved it by three of his fellow-tradesmen. Even in such a case as *Godefroy v. Jay* (1831), 7 Bing. 413, the onus was held to be upon the solicitor, and he was obliged to pay £45 damages for not entering a defence to an action, though his client really had no defence to it; see also *Hill v. Featherstonhaugh* (1831), 7 Bing. 569; *Allison v. Rayner* (1827), 7 B. & C. 441; and also *In re Broad and Broad* (1885), 15 Q.B.D. 252; and *Re Allenby and Weir, Solicitors* (1891), 14 P.R. 227.

So upon the merits of the case, so far as they have been disclosed, the solicitors have no valid claim, in my opinion, but have a judgment for \$24,589.33 with interest and costs of action after having received \$7,000 before action. Under no circumstances should such a judgment stand upon the claim of solicitors, who are officers of the Court.

However, if the case is to be dealt with on the "strict rights" upon which the solicitors rely, it, in my opinion, also fails.

It is the duty of all solicitors imposed by statute: the Solicitors Act, sec. 34: to render a bill of their fees, charges or disbursements, subscribed by them, before action. No such bill was rendered, nor was anything like a bill of costs rendered. A copy of entries in the solicitors' docket was made out and sent to the Minister: no fees or charges were set out, no figures given except

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the total amount of disbursements. No one could reasonably call that a bill of costs such as the Act requires: the solicitors could not, and did not, and so they said in their letter forwarding it to the Minister:—

“Instead of preparing a long detailed lawyer’s bill in the usual shape . . . we have prepared a memorandum of the nature of the work done . . . and following that have copied our docket entries.”

In that letter the solicitors asked the Minister to submit that which they sent “to some competent person to settle what fees we should receive.” Upon that suggestion the Minister wrote to a solicitor for the Commission, but who in reality was not and if he had been could not have acted without their authority, saying that he should be glad if the solicitor would go carefully into the subject and advise the Department what he thought a reasonable allowance under all the circumstances.

The solicitor undertook the task, and reported to the Minister that a fair and proper value of the services rendered, as shewn by the copy of the docket entries, is \$25,900, besides \$5,689.33 for disbursements. This solicitor did not, and could not, consider any question as to the need of any of the work set out in the docket: he was, and could be, only concerned in the question, what was a proper sum for each part and all of the work said to have been done?

Upon receiving that report, which was in the form of a letter to the Minister, the Minister wrote to the solicitor acknowledging the receipt of his letter, and saying: “As this account is chargeable to the Trent System, it should be paid through the Hydro and charged against the operation of the system. I am returning by messenger the bill of costs.”

And thereupon the solicitor sent the “bill” to the Commission: and the Commission apparently refused to impose the claim on the ratepayers, because they thought the solicitors should not have searched the titles: see the reporter’s notes of the trial, p. 21: and, upon the evidence as it now stands, I am unable to perceive how they could have justly and reasonably acted otherwise.

The Minister’s letter returning the “bill,” and in effect sending the matter over to the Commission as one to be dealt with by them, is dated the 21st October, 1918: and the papers seem to have been sent on to the Commission at once: yet, on the 4th November, 1918, the Minister was again dealing with the matter, having on that day made a report in which he recommended that the Lieutenant-Governor in Council should direct the Commission to pay the solicitors’ claim and charge it against the funds belonging to the Central Ontario Power System.

There is nothing in the report, or order in council, to indicate that it was known that there was any question as to the solicitors' right to be paid, or that the matter had already been sent over to the Commission, and that the Commission refused to saddle the ratepayers, or the "System," with a great debt for which they considered that neither they nor it were or was liable.

Nothing further seems to have been done until these proceedings were commenced about a year afterwards: and they were not brought down to trial until more than a year after that: in the meantime the then Minister, and indeed the then Government, went out of office, and those in power now take the position which the Commission always took, and are firmly opposing the solicitors' claim.

What the solicitors urge now is: that the order in council is an agreement in writing to pay the solicitors, and so complies with the requirements of the Executive Council Act, sec. 6; and with the provisions of the Solicitors Act, secs. 48 to 66; compliance with each being necessary to give a right of action.

But one must be very hard pressed, must indeed be catching at straws, to contend that the order in council is a contract: it is entirely a unilateral proceeding, wholly within the discretion and control of the Government, which might change or rescind it at pleasure. It was never acted upon or given any effect: and the Government now considers that it was improvidently made; and that it would be improper to act upon it, as it provides for the imposition upon the Commission and through them upon the public of a burden to which they are not liable: that is their defence.

To be a contract enforceable by the solicitors in these proceedings, it should, for a good consideration, bind the Province—in the name of His Majesty the King—to pay to the solicitors the sum claimed: but it has no semblance of such a contract, or of any kind of contract. At most it is but a direction to the Commission to pay the claim: and one may be very willing to direct some one else to pay a bill which he himself would never pay. The order in council was a matter wholly between the Government and the Commission: the Commission refused to pay, and the Government now say that they were right; and are accordingly defending this action.

It has not the least semblance of an agreement: and so far as it may be treated as a confession it is not a confession of any liability on the part of the Crown or Province, and so could not aid the solicitors in any way in their action. If it could be proof of anything, it would be proof of no liability by the Crown, but

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liability by the Commission, who are not sued: and it may be added that it is easy to confess that some one else is liable.

It is said, however, that the Commission had no right to refuse to pay, that they were merely the agents, that is the servants, of the Government, and as such were bound to obey their master's order. But again I am obliged to say that the solicitors must be hard pressed for an argument in support of their claim to rely upon any such grounds: for, in the first place, what possible right can the solicitors have to interfere in a matter between master and servant, to which they are in no sense parties? The enforcement of the order was not committed to them; they knew nothing of it except from hearsay: it never passed out of the possession and control of the Government: it must not be treated as a bill of exchange, or other order to pay, given to the solicitors in payment of their claim: in the next place, the Commission is not a mere servant or agent of the Government: it is a distinct corporate body, given the control and ownership of such things as those in question, for the public benefit, and for the safeguarding of the public interests, by reason of the Commissioners' especial ability, skill, and experience in all "hydro-electric" matters. Their usefulness should be mightily impaired if their judgment could be overruled by, and if they were obliged to submit to, any order of a Minister, or a Government, of a day—here to-day and gone to-morrow: and, lastly, if they were merely servants, is a servant bound to do that which is not lawful or right, if his master orders him to do it? I can perceive no great difference between a servant compelling, or indeed even receiving, payment of a debt which is not really owed, and putting sand in the sugar to be sold. Everything is vested in the Commission: it may be taken away from them: but now it is theirs to manage as one of their departments.

Having regard to all the circumstances of the case, I can have no manner of doubt that the Commission were not only within their rights in refusing to saddle the ratepayers with this great debt, without the question of liability being first determined in the regular way, but that, if they had not done so, they should have been guilty of a grave dereliction of duty.

So, too, even if the law did not make an agreement in writing necessary, the solicitors could not recover on a verbal agreement, for there was none. The solicitors were not bound; they only asked the Minister "to submit it to some competent person to settle what fees we should receive." The Minister did that, but in no way bound himself or any one else to the result. They were following a course which, no doubt, both expected should end in payment of the amount which the one was willing to give and

the other to receive: but they never reached that stage, and until reached either might withdraw, if indeed any withdrawal were necessary.

It was never reached, for one reason, because neither the Minister, nor the Government, had the power, or the money, to pay. It could be paid by them only when the Legislature had authorised payment; and, although five years have elapsed, the Legislature has not apparently ever been applied to for authority to pay the bill. It seems hardly possible that the Legislature could authorise payment of it by the Province, because, if it should be paid by any one, it should be paid, as every one knows, by the customers of the Central Ontario System, through their light, heat, and power bills: and, that being so, what could any one say except that: it is a matter for the Commission, and all they ask is that the bills be brought in and taxed, as the law requires and as is generally done, when payment shall be made if anything is payable.

And yet another difficulty, and an insuperable one, stands in the solicitors' way.

Assuming that a most formal agreement had been made with them to pay the amount they claim, no action could be brought upon it.

Formerly solicitors were not permitted to make contracts for payment of lump sums for costs, but were obliged to render bills of particulars, and submit to taxation of them by officers of the Court appointed for that purpose, because of their especial knowledge of, and skill and experience in, such matters. That was considered necessary because, in such matters, for the reasons I stated at the outset, the solicitors have such an advantage over the client that, if disposed to make them, hard and unconscionable agreements might be obtained by them.

Sections 48 to 66 of the Solicitors Act modified that, permitting, with a good many safeguards, the making of such an agreement, but providing (sec. 56) that no action should be brought to enforce any such agreement, but that it might be enforced on a summary application, on which any question respecting the validity or effect of it might be examined and determined: and that in certain cases the agreement must be submitted to the Senior Taxing Officer for approval before payment.

It was successfully contended before the trial Judge: that this case, being one against "His Majesty the King," is not an action, but is a petition of right, which is not an action: but the provisions of the Interpretation Act, sec. 30, were not brought to his attention: if they had been, I cannot but think that he must have been driven to the opposite conclusion: and have been

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obliged to dismiss the action if the appellant insisted upon it, as it did. That section of the Interpretation Act and sec. 2(a) of the Judicature Act together make it too plain to waste a word over it that this is an "action" within the meaning of that word in sec. 56, as well as elsewhere, of, and in, the Solicitors Act.

No action would therefore lie if the order in council were a bilateral agreement lawful under the provisions of the Solicitors Act: the solicitors could proceed upon it only in the special manner provided for in the Act: that is fatal to this action: and is but one of the "strict rights" fatal to it. Section 55 seems to me to be also fatal to it: for, if this agreement be enforced in the solicitors' favour, they are relieved by it from their negligence, contrary to the provisions of this section.

There are two more points to which I must refer, so that it may be plain that they have not been overlooked, though they seem to me to be of no weight in the solicitors' favour.

Two letters were put in, at the trial, subject to objection, and were relied upon by the solicitors, for what purpose was not stated, the learned trial Judge having allowed them to go in *quantum valeat*, as he expressed it.

One is a letter from the secretary of the Commission to one of the solicitors: the other is a personal letter from a member of the Commission, who was also a member of the Government, to his brother Minister of the Lands Forests and Mines Department.

Neither is, in my opinion, evidence in any sense, in this case: it cannot be said that they authorised the work for which the solicitors seek payment, and if they did it would not help them if the work were unnecessary: one was written more than six months and the other more than nine months after the work began; neither is a letter of the Commission, nor does it appear that the Commission ever had any knowledge of either letter: the solicitors contend that the Commission cannot be heard to object to their bill, yet rely on these letters as authorising it: so, too, it should be obvious that the letters cannot be used as evidence of the need of services charged for: there is no reason why these gentlemen should be allowed to give evidence by letter, why they should not be sworn and examined as all witnesses must: they are not the Commission, and could not make admissions for the Commission: and, if they could, and had, the admissions should be inadmissible: the Commission are not parties to the action; and it may be taken for granted that if these gentlemen were called as witnesses they should not have been able to aid the solicitors, otherwise they should not be, as they are, determinedly opposing the solicitors' claim.

But in truth there is nothing in the letters that supports the

solicitors' enormous claim in this action—more than over one-third of one per cent. of the purchase-money: eight and a half million dollars—which purchase-money may have been ten or twenty, or more or less, times the value of the lands the titles of which were searched: indeed it may be that some of the lands—"easements"—were not worth more than the sum charged for searching. All this should appear upon a regular taxation of the bill in the usual way. No weight should be given to taxations by gentlemen, however competent in their own calling, who are quite without experience as taxing officers, as they have made very plain in undertaking to "tax" without any inquiry into the facts or any attempt to learn what the objections to the bill were: and apparently assuming that the lands were worth the eight and a half millions, though that was plainly the price of all these companies possessed, of every nature and kind. To attempt to determine anything as to what—if anything—the bill should be, without a taxation, cannot, in my opinion, be anything more than a leap in the dark without need and without excuse. The secretary's letter refers to persons "claiming leases or easements under which rents were due:" saying that the Commission had not a list of the "easements or particulars respecting them," and asking for such information as would enable "us" to deal with them. But what had that to do with searching 230 land titles and 500 "easement" titles? Nothing, or indeed less than nothing, because it pointed not to titles but to the leases or deeds under which the easements were held. The books of the companies alone should shew what "easements" were held and on what terms: so that in few if any cases should it have been necessary to look at even the leases or deeds. And this information the Commission had, as the solicitors' letter from which I have already quoted—1st April, 1916—plainly shews:—

"I understand from your Mr. Pope"—the secretary—"and from the Minister of Lands Forests and Mines that, before the purchase was recommended and made, your Commission spent some thousands of dollars investigating the different assets and properties of the vendors and have a list or inventory of the properties to be transferred." "It seems to me that, with your knowledge and inventory, arrangements ought to be made to check off now with your list the properties and assets that are being handed over and that your officers and employees who made the list would be better able to do this checking than any person else. When this is done, or as it is done, the persons doing the checking should send a particular description of each parcel of real estate of which the title requires to be searched and certified by me."

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These two letters leave the impression on my mind that the solicitors must have obtained from the Commission this inventory and all the deeds and leases, as they would if they intended to search titles; and that the absence of them was the cause of the secretary's letter. But in any case one must be driven to the wall to give this letter as a reason or excuse for searching titles, when a glance at the books or at the leases or deeds gave, much better, all the information desired and sought.

The personal letter of the Minister—Commissioner also—is helpless to the solicitors: the letter says that “the general statement is that the reports as to title are made to you and that you have knowledge of the situation:” and adds, “I think it very desirable that if the matter is closed some formal report should be made in a formal way to the Commission.”

No answer to this letter was put in: if there was one, and if it were helpful to the solicitors, it would have been. What it was, if any were given, we do not know, but what it should have been is manifest: it should have said: “You have a statutory title—look at the Act:” or, if sec. 3 had not been in the Act: “You have accepted the companies’ titles, and no doubt they are all right: but, if not, searching them will not improve them or help you, it may only disturb sleeping dogs foolishly if there are any: look to your leases and deeds, book and papers: and, if a rare case of a claim not made plain in them should arise, and it should become necessary to search the title, let your solicitor communicate with the Registrar and get from him, for a trifling cost, any needed information.”

I find nothing in the letters helpful to the solicitors, and if there had been, and if it were evidence, it should only make plainer the need for a full and fair investigation of this claim in which the former Minister, as well as these two gentlemen, might be able to give some helpful evidence: it should be helpful to hear why any one could have thought this enormous expense needful: as the case stands, it seems to me to have been entirely needless: no one has proved even a shilling's worth of good it has done. I refer of course only to the searching title costs, which I understand to be about \$30,000.

The other of these two points is: that the solicitors are relieved from rendering a bill, and from any taxation in the usual course, by the fiat authorising the taking of these proceedings. Let us see what that means. It means: that because the fiat on the recommendation of the Attorney-General has said, “Let right be done,” the Crown is not only to let wrong be done, but to do it: for, if it be right that a bill should be rendered and taxed before payment, it should be manifestly wrong to require

payment without taxation and without a bill, and, not more than to mention it again, without any real trial. That it was not meant to have any such effect is very obvious from the defence pleaded by the Attorney-General, and maintained throughout: that the solicitors must render a bill and submit to taxation, as all solicitors are obliged by law to do. Such points only tend to make plainer the weakness of the solicitors' resistance of the usual, and (may it not be said?) of the universal, rights of clients, established by statute law.

And, before concluding, it may be well to point directly to some of the effects of a dismissal of this appeal: it will relieve the solicitors from the statute-imposed obligation to render a bill and submit to a taxation of it in a case that especially required observance of them: a case in which all irregular or unusual or short-cut methods are manifestly objectionable. The claim is a very unusually large one: the transactions were public transactions, not one in which those concerned had to pay anything out of their own pockets, but those who must pay are the more distant public served by the Central Ontario electric system, who have no opportunity of defending their pockets against unjust impositions except in the taxing officers appointed by law for their safe-guarding.

There has been no real trial, nor indeed any pretence of a real trial, of the vital question, whether the services charged for were, or any of them were, unnecessary or otherwise not taxable under Rule 668. The real question should be faced and tried, in the usual way, by the taxing officer, anyway should be tried and determined before this large sum is imposed on the innocent rate-payers, against the will of the Commissioners, and of the Province, in the name of His Majesty the King.

There was no agreement to pay: and so, technically as well as substantially, the solicitors are in the wrong.

There could be no agreement on the part of His Majesty the King to pay: for there was no means to make payment. The Legislature must have been applied to and an appropriation must have been first made: and in the five years which have elapsed no one seems to have had the courage to apply for the appropriation: and yet the judgment, if it stands, may compel payment without any appropriation and without the Legislature ever having had an opportunity to consider the matter.

The Commission will not pay: this Court has not said that it should: on the contrary, it has said that His Majesty the King should, and that is obviously wrong, for the debt—if there be any—is not that of the Province at large but is that of the Central Ontario Power System only.

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If the Commission should pay, the Commission should have been sued: it is untouched and untouchable by the judgment appealed against, or by any judgment that could be made in these proceedings, as long as it is no party to them: and it never could be a party—an ordinary action would be the means of reaching it. It is not said why it was not sued to compel it to raise and pay the money.

The Province could divest the Commission of the property and management of the system now wholly vested in it, but that is all it could do; and that it is hardly likely to do, for one of many reasons, because it is firmly of the same opinion as the Commission—that the solicitors should render a bill and have it taxed in the usual way, and that little, if anything, should then be found due to them.

Both Province and Commission are willing and ready to tax the bill when rendered, and to pay whatever sum, if any, shall be found due, immediately after the amount is so ascertained; then charging it against the system—that is the ratepayers—with a clear conscience on their part, and with a knowledge on the part of the ratepayers that they are not, behind their backs, being imposed upon.

Why should not that be done?

There is no question of honest or dishonest intention involved in this appeal. I treat every one, in any way connected with it, as above suspicion except of error and of obstinacy: and the former is said to be human, and the latter we all know to be always a prevalent ailment: the only question is: who is right and who is wrong? And, for the reasons which I have given, the solicitors seem to me to be plainly in the wrong in the several ways that I have mentioned: see *Re Allenby and Weir, Solicitors*, 14 P.R. 227: and I am bound to add: that, if the conclusion had been reached that they are, in legal technicality, right, I should still have been in favour of requiring them to have a bill taxed in the usual way before imposing on the ratepayers this very large claim—a power which the Court plainly has.

As it is, I am in favour of allowing this appeal, and, in effect, dismissing the action.

LATCHFORD, J.:—It is plain that, having regard to sec. 34 (1) of the Solicitors Act, R.S.O. 1914, ch. 159, an action for the recovery of fees, charges or disbursements, for work done by a solicitor cannot be brought until one month after a bill of costs has been rendered, unless (sec. 49 (1)) an agreement in writing has been made between the solicitor and the client respecting the

amount and manner of payment for . . . services in respect of business done . . . by such solicitor.

The questions arising on this appeal are not, in my opinion, whether the employment of the suppliant firm by the Minister of Lands Forests and Mines was necessary in view of the provisions of 6 Geo. V. ch. 18, and the contract therein referred to, and what is the amount proper to be allowed for the services rendered; but (1) whether a petition of right is an action: (2) whether a bill of costs was rendered by the suppliants; and, if not, (3) whether such an agreement was made as obviates the necessity of delivering a bill of costs.

It seems too late for the Crown to say that the work done by the suppliants was unnecessary. They were employed by a Minister as much a representative of His Majesty as the Minister whom Mr. Bayly now represents: and they appear to have done what, rightly or wrongly, they were employed to do. As a matter of right they should be paid whatever their necessary services are worth. I understood counsel for the Crown to say that the Crown is willing to pay such costs as are properly taxable when fixed by the proper officer. He asks, in the meantime, on the grounds stated, that the appeal be allowed and the action dismissed.

The learned trial Judge held, on the authority of *Rustomjee v. The Queen*, (1876), 1 Q.B.D. 487, that a petition of right is not an action. The decision in that case does not seem to me to go so far, but only to the extent of stating that the Statute of Limitations relates only to the course of procedure between subject and subject: Cockburn, C.J., at p. 492; Blackburn, J., at p. 496.

It may well be that a petition of right is not an action within the meaning of the Solicitors Act until the fiat is issued which converts it into the fulness of life: but thereafter, in this Province, it is, in my opinion, an action according to our statute law.

Section 2(a) of the Judicature Act declares that "action" shall mean not only a civil proceeding commenced by writ but also (a civil proceeding commenced) "in such other manner as may be prescribed by the Rules."

Rules 738-747 prescribe the form which a petition of right shall follow, by whom it shall be signed, with whom left, to whom submitted for the fiat "Let right be done:" and what, as well as how and when, subsequent proceedings are to be taken.

By Rule 748 the costs of a petition of right are recoverable in the same way as in ordinary actions.

While a petition of right is not an ordinary action, it is a civil

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proceeding commenced and even prosecuted in a manner prescribed by the Rules, and is therefore an "action" within the definition contained in the Judicature Act. The same definition is extended to the Solicitors Act, as to an Act relating to legal matters, by sec. 30 of the Interpretation Act.

Considered without reference to our statutes, "action" is usually a general or generic term, as was said by Lush, L.J., in the first stage of the protracted case of *Clarke v. Bradlaugh* (1881), 7 Q.B.D. 38, 57; and includes, unless restricted by the context or by statute, a living petition of right as a species or kind. Nothing appears in the Solicitors Act limiting the general meaning of "action" as employed in sec. 34 (1).

With much diffidence but after careful consideration, I have reached the conclusion that the statement of services delivered to the Hon. George Howard Ferguson, Minister of Lands Forests and Mines, cannot be called a bill of the kind specified in sec. 34 (1).

"A bill thereof" means a bill of the "fees, charges or (and) disbursements" for business done by a solicitor. No fees or charges but only disbursements appear in the statement rendered by the suppliants. I therefore think it cannot be regarded as a bill of costs within the meaning of the Solicitors Act.

Under sec. 49 (1) of that Act it was open to the solicitors to make an agreement in writing with their client, the Crown, respecting the amount and manner of payment for the whole or a part of their services in respect of the business done by them.

The suppliants assert that such an agreement was made, relying on their letter accompanying the so-called bill as an offer, acted upon by the reference to Mr. Kilmer, and the order in council directing payment as an acceptance. This contention has been adopted by the learned trial Judge, who considered the order in council an approval of the adjustment of account and an acknowledgment of the prior retainer and so amounting to an agreement to pay.

The solicitors' letter to the Hon. Mr. Ferguson offers to accept whatever a competent person shall determine to be the amount due for the services rendered. A person of undoubted competence is agreed on: he investigates and reports to the Minister the result, which is satisfactory to the suppliants. Then the order in council is passed, directing the Hydro-Electric Power Commission to pay the amount regarded by Mr. Kilmer as due to the suppliants.

In the reasons for the judgment appealed from, the order in

council is regarded as an approval of the adjustment of the account, and an acknowledgment of the retainer, and so amounting to an agreement to pay.

In *Ray v. Newton*, [1913] 1 K.B. 249, the agreement was much more formal and definite than in the present case, and the statute almost identical with our own, yet the Court of Appeal held that the client was entitled to have a complete bill of costs rendered and an inquiry had regarding the agreement.

As a matter of first impression I thought that the learned trial Judge had the right, exercised upon ample evidence, to fix the amount recoverable by the suppliants without referring the matter to the Taxing Officer.

Consideration, however, of the judgment of my Lord the Chief Justice has induced the conviction that the Solicitors Act interposes an insuperable bar to the maintenance of the action, and I therefore agree with him that the appeal should be allowed.

Appeal dismissed (MEREDITH, C.J.C.P., and LATCHFORD, J., dissenting).

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[APPELLATE DIVISION.]

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Assessment and Taxes—Income Assessment—Railway Commissioner—Place of Business—Place of Residence—Statutory Requirement—Place where Salary Received—Assessment Act, secs. 5, 12—"Resident"—"Resides"—Act respecting City of Ottawa, 10 Edw. VII. ch. 121, sec. 1 (2)—Special Exemption of Civil Servants for Fixed Period—Computation—"Assessment."

The Assessment Act, sec. 5, makes liable to assessment, *inter alia*, "all income derived either within or without Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same;" and sec. 12, dealing with the place within Ontario where the assessment is to be made, describes it as "the municipality in which he resides."

The defendant, a member of the Dominion Board of Railway Commissioners, had his office or place of business in Ottawa, received his salary there, and while there dwelt in a suite of apartments in an apartment house; but he had a dwelling-house and home at a place in the Province of Quebec where his wife and family lived, and where he spent the time not devoted to his official duties. The Railway Act requires that a Railway Commissioner shall reside in Ottawa or within 5 miles therefrom:—

Held, that the defendant was liable to taxation by the municipality of Ottawa in respect of his income received in Ontario.

Discussion of the meaning of "resident" in sec. 5 and "resides" in sec. 12.

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Held, also, that sec. 1 (2) of an Ontario Act respecting the City of Ottawa, 10 Edw. VII. ch. 121, providing that the city corporation "shall not assess or levy or collect any tax from any person resident in the said city in the service or employ of the" Government of Canada "in respect of the income of such person derived from such occupation, for a period of 10 years from the . . . 9th day of December, 1909," was not applicable to taxation for the year 1920.

Per MEREDITH, C.J.C.P.:—Assessment is prohibited as well as levy and collection; but that must mean assessment for the purpose of taxation in one of the prohibited 10 years; it cannot mean assessment for an 11th year.

ACTION brought in the County Court of the County of Carleton, by the Municipal Corporation of the City of Ottawa, against the Honourable Wilfred Bruno Nantel, to recover taxes amounting to the sum of \$214.90, claimed to be due in and for the year 1920, on his income as a member of the Board of Railway Commissioners for Canada.

The admitted facts were as follows, as stated by CONSTANTINEAU, Jun. Co. C.J., by whom, without a jury, the action was tried:—

The defendant was appointed to the Board of Railway Commissioners in 1914. Prior to his appointment thereto, he was a member of the Federal Cabinet. For many years past, commencing at the time he became a Minister of the Crown down to the present day, he has been occupying a suite of furnished apartments at the Roxborough Apartments, in the city of Ottawa, where he has been staying whenever his official duties required his attendance here. Occasionally his wife occupied the said apartments with him when she came to Ottawa on temporary visits.

Before the defendant became a Minister and for a long time previous thereto, he had a dwelling house and a home at St. Jerome, in the Province of Quebec, which he has never relinquished but continues to occupy with his wife and family, at all times when his presence at the Capital is not needed. Since his appointment to the Commission, his wife has very seldom stayed with him at Ottawa, and he spends his week-ends, his vacations, and any time not devoted to official duties, with her at St. Jerome.

The law provides that a Railway Commissioner shall reside at Ottawa or within 5 miles therefrom. In 1918, the plaintiffs, alleging that the defendant was not within the class of persons exempted by a certain agreement, assessed him on his income as Railway Commissioner; but, upon an appeal to the Court of Revision, the assessment was vacated on the ground of non-residence.

In 1919, he was likewise assessed on his income, and again the assessment was set aside by the Court of Revision, on the same ground as in the previous year, but the ruling of the Court was reversed on appeal to the County Court Judge, His Honour Judge Gunn, who held that Mr. Nantel was a resident of Ottawa.

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The head office of the Railway Commission is in St. George Ward, and the defendant is assessed there, though the Roxborough Apartments, where he resides, are situate in another part of the city, called the Central Ward. He is also nominally assessed in the latter ward for his furnished apartment, but the taxes are paid by the landlord.

The learned County Court Judge gave judgment for the plaintiffs for the recovery of \$214.90 and costs.

The defendant appealed from this judgment to the Appellate Division.

November 2. The appeal was heard by MEREDITH, C.J.C.P., LATCHFORD, MIDDLETON, and LENNOX, JJ.

C. A. Seguin, for the appellant, contended that, under the Assessment Act, R.S.O. 1914, ch. 195, sec. 12, the defendant's income was not taxable within Ontario because he resided in Quebec; and, if this section clashed with sec. 5 of the same Act, sec. 12 must prevail. On the meaning of the word "residence," see *Hart v. Kip* (1893), 26 N.Y. Supp. 522, at p. 524, and on the meaning of "assess," see *Corpus Juris*, vol. 5, p. 813, and *Bouvier's Law Dictionary*, vol. 1, p. 256. He further pointed out that the plaintiffs assessed the defendant prior to the 9th December, 1919, and argued that therefore the 10 years' exemption provided for by the Ontario statute 10 Edw. VII. ch. 121, applied to the taxes for the year 1920. He also referred to secs. 3, 4, 49, 94-99, and 217 of the Assessment Act.

F. B. Proctor, for the plaintiffs, respondents, argued that the defendant's residence was really in Ottawa, because there he was carrying on his trade or business, and therefore he should be assessed there: *Halsbury's Laws of England*, vol. 16, p. 644, paras. 1299, 1300; p. 665, para. 1332; *Regina v. Justices of County Fermanagh*, [1897] 2 I.R. 559, at p. 563; *Re Sturmer and Town of Beaverton* (1911), 24 O.L.R. 65, at p. 68; *Bond v. Overseers of St. George Hanover Square* (1870), L.R. 6 C.P. 312; *Rex v. Assessors of Fredericton* (1913), 11 D.L.R. 713. The American cases on the question of residence are inapplicable, the statute-law being different. As to the application and effect of the Ontario legislation granting exemption to Dominion Govern-

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ment servants, see 62 & 63 Vict. (Dom.), secs. 1, 15, 16, amended by 2 Edw. VII. ch. 45 and 9 & 10 Edw. VII. ch. 45; *Leprohon v. City of Ottawa* (1878), 2 A.R. 522.

Seguin, in reply, referred to the Assessment Act and the appended forms.

November 18. MEREDITH, C.J.C.P.:—This case has been argued before us, and seems to have been looked upon, throughout, as if the defendant could not be liable to taxation in Ontario in respect of his income, if he really resides in Quebec: but of course that is not so.

Under sec. 5 of the Assessment Act, R.S.O. 1914, ch. 195, "all income derived either within or out of Ontario by a person resident therein, or received in Ontario by or on behalf of any person resident out of the same, shall be liable to taxation.

The income in question was received by the defendant in Ontario by himself, and so comes clearly within that enactment.

There is nothing in secs. 12 and 13 to save the defendant from such taxation; and under them the defendant may, and probably must, be taxed at Ottawa, because his place of business is there. He is a member of a Board the offices of which are permanently there; and there the income in question was received and no doubt placed to his credit in a bank at Ottawa.

So, assuming, as I do, that the defendant does not reside at Ottawa or elsewhere in Ontario, the income in question is liable to taxation under the provisions of the Assessment Act. No one has suggested that that legislation is *ultra vires* of the Province: see *Re City of Windsor and McLeod* (1921), 50 O.L.R. 305.

Then are the plaintiffs prohibited from imposing the tax in question by sec. 1 (2) of an Act respecting the City of Ottawa, 10 Edw. VII. ch. 121, which provides, among other things, that the Corporation of the City of Ottawa "shall not assess or levy or collect any tax from any person resident in the said city in the service or employ of the" Government of Canada "in respect of the income of such person derived from such occupation, for a period of 10 years from the said 9th day of December, 1909?"

The defendant is admitted to be in such service; but on his behalf has been urged, with much force, that he is not a person resident in Ottawa, that his only place of residence is in the Province of Quebec.

If so, he is not within the protection of this enactment: but: even if not so, the Act is not, in my opinion, applicable in any

way to taxation for the year 1920. It was plainly intended to cover 10 years only, the years 1910 to 1919 inclusive. The prohibition is against income taxation for a period of 10 years from the 9th day of December, 1909: all such taxation is for a calendar year at a time; there could, therefore, be no relief from taxation for the broken part of the month of December, 1909: it should begin and could begin its first year on the 1st day of January, 1910: and end on the 31st day of December of the 10th of the 10 years—1919.

The Act does prohibit assessment as well as levy and collection; but that must mean assessment for the purpose of taxation in one of the prohibited 10 years; it cannot mean assessment for an 11th year.

Therefore each ground of this appeal fails, in my opinion, and consequently the appeal should, in my opinion, be dismissed.

LATCHFORD, J.:—The facts as found by the learned trial Judge are not questioned on this appeal.

The appellant is a person in the service of the Government of Canada, and, if liable to be assessed upon his income for 1920, is liable for the amount claimed in this action.

The agreements and legislation under which the Hon. Mr. Nantel claims to be exempt from taxation on his income appear as schedules to ch. 121 of 10 Edw. VII. (Ont.), and in sec. 1 (2) of that Act. As amended by statutes not material to be considered, the agreements are declared to be subsisting, valid, and binding, except in so far as they may be altered by a certain agreement authorised to be made, and “shall continue so to be for a period of 10 years from the 9th day of December, 1909, but shall then lapse and become void and no longer have any force or effect” (sec. 1(1)).

The agreement so authorised is to be upon the terms of an order in council of the 9th December, 1909, set forth as schedule C to the said Act. Certain annual payments are to be made by the Government to the city for a period of 10 years extending from the 1st July, 1909, to the 1st July, 1919.

Whether or not a formal agreement was executed does not appear. Not improbably the statutory enactment, embodying as it did the order in council, was regarded by the city and the Government as sufficient.

Looking at the purpose of the agreement and statute, so far as they affect persons in the Dominion Civil Service, it is plain that they were intended to exempt such persons from taxation upon their income for a period of 10 years extending from the end of 1909 to the end of 1919. The words used to express this

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purpose seems to me not to have been very happily chosen, and have led to one of the contentions on which this appeal is based.

It is asserted that the city did assess the appellant prior to the 9th day of December, 1909, in violation of the final clause of sec. 1 (2), which provides that the Corporation of the City of Ottawa "shall not assess or levy or collect any tax from any person resident in the said city in the service or employ of the said Government" (the Government of Canada) "in respect of the income of such person derived from such occupation for a period of 10 years from the said 9th day of December, 1909."

The preparation of the assessment rolls for any year is made in the preceding year.

If "assess," used as it is in the statute disjunctively with the words "levy" and "collect," means the entry on the collector's roll, the completion of the roll by its deposit with the city clerk, and its confirmation by the Court of Revision, all happening prior to the 9th December, 1919, the appellant and other members of the Dominion Civil Service would be immune from taxation on income not for 10 but for 11 years. To give that meaning to the statute would be contrary to the express limitation of the agreement to a period of 10 years, and in manifest violation of the purpose the city and Government had in view in entering into the agreement. I therefore consider that "assess" as used means "impose a liability to be taxed"—which was not done prior to the 9th day of December, 1909, but in February, 1920, when the by-law imposing the rate for that year was passed.

The other ground of the appeal is that the trial Judge erred in holding that Mr. Nantel was during 1920 a resident of the city of Ottawa.

With exceptions not material to be considered here, all income derived either within or out of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same, is, by sec. 5 of the Assessment Act, liable to taxation.

The appellant has been found to be a "person resident" in Ottawa in this Province, within the meaning of sec. 5, and therefore has been held liable to pay a tax upon his income to the City of Ottawa.

The finding that he is such a resident is based upon decisions as to the meaning of the words "resident," "residence," and "resides," upon the fact that since his appointment in 1914 to the Board of Railway Commissioners, as well as for some years

previously when he was a member of the Dominion Government, Mr. Nantel occupied a suite in an apartment house in Ottawa, and the further fact that he is required by the Railway Act as such Commissioner to reside in the city of Ottawa or within 5 miles of it.

Decisions as to "reside" and its derivatives are not of much assistance. The cases shew that the words as used in a particular collocation or context have widely different meanings. The requirement of the Railway Act as to residence in (or near) Ottawa may well be regarded as satisfied by such occupancy of such apartments in the city as Mr. Nantel maintains, and yet that occupancy may not constitute him a person resident in Ontario within the meaning of the Assessment Act, when the fact is that he has his chief place of residence—his hearth and home, his *lares* and *penates*—at St. Jerome in the Province of Quebec. Had he a similar home in one municipality in Ontario outside the city of Ottawa, he would, under sec. 12, be assessed for income in that municipality. Residence is, however, not the only basis of liability for the taxation of income—sec. 5 also provides that "*all income.....received in Ontario by.....any person resident out of the same shall be liable to taxation,*" subject to exceptions which do not apply here.

The appellant is paid at Ottawa. He there receives the income for which the city did not assess him until 1920, and the fact that he is or may be really resident out of Ontario is immaterial.

I therefore think the appeal fails.

MIDDLETON, J.:—Appeal by the defendant from the judgment of His Honour Judge Constantineau in an action to recover taxes upon the income of Mr. Nantel as Railway Commissioner for the year 1920.

The Assessment Act, R.S.O. 1914, ch. 195, sec. 5, makes liable to assessment, *inter alia*, "all income derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same."

If Mr. Nantel is resident in Ontario, then his income is taxable. If he is not resident in Ontario, he is not liable unless the income is "received in Ontario."

Section 12, dealing with the place within Ontario where the assessment is to be made, describes it as "the municipality in which he resides." So that no municipality is authorised to impose an income assessment in the absence of residence.

One would expect that "residence" would in the Act always

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have the same meaning; but, when it is borne in mind that sec. 5 contemplates the assessment of persons resident out of Ontario in certain cases, it seems necessary to attribute some meaning to the expression "the municipality in which he resides," found in this auxiliary clause, which will not defeat and render futile the main provision of the statute.

The word "reside" is very flexible and has more than once been said to be incapable of exact definition. The duty of the Court in interpreting any statute where the word is found is to attribute to it such meaning as will best give effect to the legislative will.

Some things have been made quite clear by decided cases. Residence is quite distinct from domicile, and any attempt in statutes such as this to treat the words as equivalent must almost inevitably defeat the object of the statute. A foreigner may reside here many years with his wife and family, and yet retain his domicile of origin. The change of domicile depends upon the will of the individual, and no Legislature ever intended the liability to bear the burden of taxation properly attributable to residence to depend on the volition of the person to be taxed. A man may have several residences, but it follows from the rule of construction that there is a presumption against an intention to impose a double burden of taxation upon any individual, and so discriminate against him that a meaning must be sought which will avoid this consequence. This meaning is found, so far as sec. 5 is concerned, if the residence for the purpose of that section is taken to be the chief home of the individual in question, his "settled abode," the home of his wife and children, the place of his *lares and penates*, as distinguished from the place where he eats and sleeps when absent from home on official business, or a "summer-home" only occupied for a season. These places are residences for many purposes, but not such residences as would render him liable for taxation in each place, if all should be in the Province.

It follows that Mr. Nantel is resident out of Ontario within sec. 5, and so is liable for taxation only upon his income received within Ontario.

Coming then to the question whether, under sec. 12, Ottawa can be regarded as the municipality within which Mr. Nantel resides, so that it may assess him on the income he receives in Ontario as Railway Commissioner, it is clear that there is no such right unless "residence" has here some other meaning than that I have given it in sec. 5. I think it has. In sec. 5 the Legislature, speaking with reference to persons over which it has

jurisdiction, divides them into persons resident in Ontario and persons not resident in Ontario, and I have concluded that when a man has more residences than one the chief residence governs. Under sec. 12 the point to be determined is, what municipality in Ontario is to impose the tax? I conclude that the meaning to be attributed to the legislative answer to this question "that municipality of Ontario in which he resides" is "that municipality in which his chief residence in Ontario is." This is the same answer as must be given in the case of a resident of Ontario. One residing, in the sense I have indicated, in Toronto, but having a summer residence or temporary residence elsewhere in the Province, must be assessed at Toronto, his chief place of residence within the Province.

I do not think this question is solved by the fact that Mr. Nantel has a residence in Ottawa, sufficient to answer the requirements of the Dominion Act regarding the residence of Railway Commissioners. Nor am I in any degree helped by the fact that his residence might well qualify him as a voter. I prefer to interpret this Assessment Act by its own provisions. Far less assistance is obtained from cases based on other legislation in the United States and England. The true light must be found within the statute. All else only increases the darkness.

There remains the question as to the special Act. The argument is that the legislation which purports to confirm the agreement by which, in consideration of certain payments by the Government during 10 years, the salaries paid to civil servants should for the like period be exempt from income tax, has the effect of giving to the civil servants an exemption from taxation for at least 11 years. This is based upon the words used in the Act 10 Edw. VII. ch. 121, sec. 1 (2), which are that the Corporation of the City of Ottawa shall "not assess or levy or collect any tax" from civil servants "for a period of 10 years from the said 9th day of December, 1909."

Ten years' exemption has been granted. The 11th year is claimed, because, it is said, some part of that which the ratepayer calls "assessment" took place before the 9th December, 1919, though it culminated in the imposition of taxes for 1920. There are two answers. The action of the municipality which is forbidden is that contemplated by sec. 297 (1) of the Municipal Act, which requires the council of the municipality to "assess and levy" a sum sufficient to provide for the outgoings each year. This was not done within the prohibited period. The preparation of the assessment roll, though sometimes called "assessment," is not the assessment here contemplated.

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Secondly, nothing that was in fact done before the 9th December, 1919, could possibly be regarded as an assessment.

By no possible stretch of imagination could it be presumed to have been intended that 11 years' exemption from taxation was contemplated.

The appeal should be dismissed with costs.

LENNOX, J., agreed in the result.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

Oct. 20.
Nov. 18.

RE McCLURE.

Will—Construction—Direction to Executors to Sell Land and Divide Proceeds between Sons of Testator—Sale of Land by Testator himself after Execution of Will—Mortgage Given for Part of Purchase-money Regarded as "Proceeds."

By his will the testator directed his executors to sell his farm and divide the proceeds between his two sons. After the date of the will, the testator himself sold the farm. Part of the purchase-money was secured by a mortgage—the only asset which came to the hands of the executors:—

Held, that the mortgage, which was part of the proceeds of the farm, passed in the same way as if the executors had sold the land and the money secured by the mortgage had been received by them as part of the proceeds of a sale made by them.

Review of the authorities.

Gale v. Gale (1856), 21 Beav. 349, *In re Clowes*, [1893] 1 Ch. 214, and *Re Dods* (1901), 1 O.L.R. 7, distinguished.

Beddington v. Baumann, [1903] A.C. 13, and *In re Bick*, [1920] 1 Ch. 488, specially referred to.

Re Graham (1915), 8 O.W.N. 497, approved.

Judgment of MIDDLETON, J., affirmed.

MOTION by the executors of the will of William McClure the elder, deceased, upon originating notice, for an order determining a question arising upon the will.

October 12. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

W. A. Skeans and M. C. Hooper, for the executors.

J. H. G. Wallace, for William McClure the younger and George McClure.

October 20. MIDDLETON, J.:—The testator died on the 7th

August, 1921, having first made his will, which bears date the 22nd May, 1919, and which has been duly admitted to probate.

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By this will the testator directed that his executors should sell his farm, lots 14 and 15 in the 8th concession of Vaughan, and divide the proceeds into two parts, five-sevenths and two-sevenths respectively, the five-sevenths to be paid to his son George and the remaining two-sevenths to his son William.

After the date of his will, the testator himself sold the farm; part of the purchase-price, \$4,100, being secured by a mortgage thereon. The only asset which has apparently come to the hands of the executors is this mortgage. The applicants contend that the will of the testator, as to the property dealt with by it, must be interpreted as though executed immediately before his death, and that, therefore, the devise fails because the farm had already been sold and the will could not operate upon it. The mortgage was personalty and passed as personalty. In support of this reliance is placed upon *Re Dods* (1901), 1 O.L.R. 7. On the other hand, Mr. Wallace relies upon the case of *Re Graham* (1915), 8 O.W.N. 497, where Mr. Justice Clute dealt with a will which I cannot distinguish from the will now before me. He there distinguished *Re Dods*, and determined that, where the devise is not of the lands but of the proceeds of the lands, the fact that the testator subsequently sold the lands does not cause the legacy to fail, but the proceeds of the lands in the executors' hands, as the result of the testator's own conversion of the farm, pass in the same way as the proceeds of conversion would have gone if the executors had themselves been able to convert.

Apart from this case, I should have followed what I believe to be the law as expounded in *Re Dods*, but it is my duty under the statute (Judicature Act, R.S.O. 1914, ch. 56, sec. 32) to follow my late brother in the decision which he has made, and I think it wise to do so rather than to attempt to create any merely artificial distinction, leaving it to an appellate Court to review the situation if the parties think the decision ought to be reconsidered.

I, therefore, declare that the mortgage, which is part of the proceeds of the land, passes in the same way as if the executors had sold the land and the money secured by this mortgage had been received by the executors as part of the proceeds of a sale made by them. Costs of all parties should be paid out of the estate.

The executors appealed from the judgment of MIDDLETON, J.

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November 4. The appeal was heard by MEREDITH, C.J.C.P., HODGINS, J.A., and LATCHFORD and LENNOX, JJ.

William Proudfoot, K.C., for the appellants. The sale by the testator of the lands in question, instead of their sale by his executors, was a revocation of that part of his will relating to the gift to the respondents: *Re Dods*, 1 O.L.R. 7, where it was held "that sec. 25 of the Wills Act, R.S.O. 1897, ch. 128, had not the effect of making the devise applicable to the interest in the land which the testator had at the time of his death by virtue of the mortgage; the mortgage was part of the personal estate, and fell under the absolute bequest to the wife." He also referred to *Re Graham*, 8 O.W.N. 497; *Re Smith* (1913), 5 O.W.N. 501, 15 D.L.R. 44; *In re Clowes*, [1893] 1 Ch. 214; Theobald on Wills, 7th ed., pp. 170, 211, and 212; *Arnald v. Arnald* (1784), 1 Bro. C.C. 401; the Wills Act, R.S.O. 1914, ch. 120, secs. 26 and 27.*

J. H. G. Wallace, for the respondents, distinguished the cases cited by counsel for the appellants upon the facts. The testator in his lifetime merely took an opportunity to relieve his executors of a certain burden cast upon them, but it nowhere appears that his intention towards the respondents had in any way changed. For the law, he relied upon the cases cited in the trial judgment.

Proudfoot, K.C., in reply.

November 18. HODGINS, J. A.:—The learned Judge appealed from followed a decision of the late Mr. Justice Clute in *Re Graham*, 8 O.W.N. 497, but referred to a decision to the contrary effect of Boyd, C., in *Re Dods*, 1 O.L.R. 7, followed in *Re Beckingham* (1913), 5 O.W.N. 607. These are both cases in which the property had been directly devised, and were based upon English decisions, of which *Farrar v. Winterton* (1842), 5 Beav. 1, and *Gale v. Gale* (1856), 21 Beav. 349, are examples. The last mentioned case has been finally disengaged from the criticism of Lord St. Leonards and Malins, V.-C., and is firmly established by the House of Lords in *Beddington v. Baumann*,

*26. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real estate or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real estate or personal estate, as the testator had power to dispose of by will at the time of his death.

27.—(1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

[1903] A.C. 13. Consequently, if this case falls within that decision, the *Graham* case was wrongly decided.

It is important to know exactly what the *Gale* case decided. The principle upon which it proceeds is, that there was a devise of a particular property which, by the act of the testator subsequent to the making of his will, was so changed or destroyed that it ceased to exist, and that he thereby worked a revocation of his will in respect thereto.

The argument in that case and in the earlier case of *Moor v Raisbeck* (1841), 12 Sim. 123, was that, while the testator had changed the character of the devised property, he still retained an interest in it, different in kind, namely, the proceeds thereof, which, having regard to sec. 23 of the English Wills Act, 1 Vict. ch. 26 (identical in terms with sec. 26 of our Wills Act, R.S.O. 1914. ch. 120), would properly pass to the devisee. That argument was rejected in those cases, as it was by Sir G. Jessel in *Blake v. Blake* (1880), 15 Ch. D. 481, and by Lindley, L.J., in *In re Clowes*, [1893] 1 Ch. 214, because there was nothing in the will to indicate that the proceeds and not the thing itself were included in the subject-matter of the devise.

The will here does not devise the farm, but the proceeds thereof; and as at the date of the testator's death those proceeds were *in esse*, though not produced by a sale by the executors, but by the testator's intermediate act, there is, in my opinion, an essential difference between this case and the case of *Gale v. Gale* (*ante*) and those decisions which followed it.

Lord Halsbury, L.C., in the *Beddington* case, has, in my humble judgment, expressed this difference in such a way as to enable this case to be decided without in any way impugning the earlier authorities. In dealing with the real question to be decided he proceeds ([1903] A.C. at pp. 15 and 16):—

“Practically, therefore, it comes to this, whether apart from any special direction or language in the instrument—whether it was a disposition of the man's own property or whether it was an appointment, seems to me to be for this purpose perfectly immaterial—you can find in the instrument that the person who made that testamentary instrument has made a disposition, if it was property, or executed a power of appointment, if it was a power of appointment, in such words and under such circumstances as to shew that he was not devising the particular property alone, but that he was intending that something which should represent that property, if it had undergone a change between the two periods—the time of the death and the time of the making of the instrument—should nevertheless pass to the person whom he had made his devisee or appointee.”

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Lord Shand also deals with this aspect of the subject when he says (pp. 17 and 18) of the property affected by the will in that case:—

“On the other hand, the appointment in its terms relates to the property only; it does not affect or refer to the money which has been realised from part of the property having been sold; it does not in its terms in any way deal with the proceeds that have been received from that sale. It appears to me, my Lords, that under those circumstances the general principle ought to receive effect that, where a subject which has been given by the terms of the appointment is gone in part or in whole, the appointment cannot take effect upon the money which has been received as a substitute. The appointment does not bear to include or to refer to money which might be received if the property should be sold or converted in any way in future; and there is no deed subsequent to the appointment after the change had taken place declaring that the moneys which the trustees had received were to go in the same way as the property appointed. In the absence of anything of this kind, I cannot proceed on a conjectural view as to what may have been intended, but certainly not expressed in the terms used. I do not think the testator can be held to have given an appointment which relates to that money.”

Lord Davey, too, puts the question, which he thinks must be answered in dealing with the will, in these words (p. 20):—

“Is Mr. Beddington’s will expressed in such language and in such large terms as to carry not only the property as it then existed, but also this property which has arisen from the particular dealings with it?”

These observations are only an amplification in clear terms of what was said in previous cases. An example of these is *In re Dowsett*, [1901] 1 Ch. 398. Farwell, J., there said (p. 401):—

“In cases of this sort the question appears to me always to be one of construction. Has the testator . . . expressed his intention to give the particular property, or the property which may from time to time represent the particular property . . . ?”

Applying the principle which the learned Law Lords enunciated, I think there should be no difficulty in deciding that the words of this will, so far as they give anything to the respondents, shew that the testator was intending to give, not the farm itself, but what its sale produced, the “proceeds,” as the will expresses it. The change in the lifetime of the testator did not alter the character of what he devised to his sons, but merely anticipated the conversion which the will directed, leaving as the result that which he, in terms, dealt with.

Attention may be directed to a recent judgment of P. O. Lawrence, J., *In re Bick*, [1920] 1 Ch. 488, in which the view is expressed that the effect of sec. 23 of the English Wills Act (*ante*) is merely to repeal the old law under which a change of interest in itself revoked a gift and to leave the Court free to construe the will in such a way as to carry out the testator's intention.

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In the result I would affirm the judgment, and dismiss the appeal.

LATCHFORD and LENNOX, JJ., agreed with HODGINS, J.A.

MEREDITH, C.J.C.P.:—This case seems to be a simple and plain one, that is if we do not let it get mixed up with other cases that really have little, if any, bearing upon the real question for consideration.

The testator bequeathed to the respondents the proceeds of certain lands which he directed his executors to sell: but before his death he sold the lands himself and took a mortgage of them from the purchaser, securing payment of the price of the lands or the greater part of it.


It is contended for the appellants that that sale was a revocation of the will to the extent of the gift in question, or an ademption of it.

But why so? It, in effect, merely made unnecessary a sale by the executors: the same proceeds go to the same beneficiaries, by one step less: the sale step, which the testator chose to take himself in his lifetime, an opportunity, no doubt, presenting itself which enabled him to do so, and so relieve the executors from taking it.

The proceeds have in no sense lost their identity; nor have they been in any way mixed with other money or property: they are only more ready for the hand of the beneficiary to receive them.

The case of *In re Clowes*, [1893] 1 Ch. 214, and the case in this Province in which Boyd, C., seems to have followed *In re Clowes*, whether rightly or wrongly decided, are not in point: they were cases of devises of land, in which a wide effect was not given to the great change in law and in equity effected by the legislation contained in the Wills Act, sec. 26—sec. 23 of the Imperial enactment: see *In re Carter*, [1900] 1 Ch. 801; *Morgan v. Thomas* (1877), 6 Ch. D. 176; and *In re Bick*, [1920] 1 Ch. 488.

I am in favour of dismissing the appeal.

Appeal dismissed with costs. 

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[APPELLATE DIVISION.]

Nov. 18.

RE OLIPHANT.

Devolution of Estates Act—Interest of Widow in Husband's Land at his Death—Absence of Election—Dower—Secs. 9 and 12 of Act.

The judgment of MIDDLETON, J., ante 84, affirmed.

AN appeal by Robert Oliphant, administrator of the estate of Maria Oliphant, deceased, from the judgment of MIDDLETON, J., ante 84.

November 3. The appeal was heard by MEREDITH, C.J.C.P., HODGINS, J.A., and LATCHFORD and LENNOX, JJ.

W. S. MacBrayne, K.C. for the appellant. This is a question of the application of the Devolution of Estates Act, where the husband dies intestate leaving a wife and no children. Reading together secs. 4, 12 (1), and 30 of the Act, R.S.O. 1914, ch. 119, it is clear that, if the widow made no election, she was entitled to a \$1,000 interest in her husband's estate, and that therefore the \$1,000 (even though it comes out of the real estate) goes to the widow's representative.

*W. M. McClemon*t, for the next of kin of Isaac Oliphant, deceased, respondents. The widow failed to elect under sec. 9 of the Devolution of Estates Act to take an interest under sec. 12 in the undisposed of real estate of her intestate husband, in lieu of dower. She did not comply with the provisions of sec. 9 and sec. 12, sub-sec. 4, and on the contrary exhausted her dower; hence at her death all her right, title, and interest in her husband's estate was at an end.

MacBrayne, K.C., in reply.

November 18. MEREDITH, C.J.C.P.:—The single question involved in this appeal is: what interest did the widow take in her husband's land at his death?

And the answer, I should have thought, must, manifestly, be: dower only: because she did not "elect to take her interest under "the Devolution of Estates Act" in her husband's undisposed of real property in lieu of all claim to dower . . . " (sec. 9).

It is true that that enactment provides generally for the disposition of undisposed of real property as if it were personal property: but it also provides in the plainest terms for the particular case of dower, and those provisions must prevail.

The section of the Act which gives the widow the right of election to which I have referred—sec. 9—provides that: "Noth-

ing in this Act shall take away a widow's right to dower:" it then gives her a right to elect to take under the Act in lieu of dower, and then provides that: "unless she so elects she shall not be entitled to share in the undisposed of real property."

Section 12 was also relied upon in support of this extraordinary claim, made by the personal representative of the widow, she being now dead also; but it, too, is, in equally plain words, applicable, in such a case as this, only "if the widow elects under section 9" to take under the Act, "in lieu of dower:" sub-sec. 4.

The appeal must be dismissed.

HODGINS, J.A.:—The Devolution of Estates Act has assimilated the distribution of the real estate to that of personal property. It has, however, respected the dower interest, so that the widow retains it unless she elects not to do so. In the case in hand she remained in possession of the real estate of her intestate husband until her death. The sole claim made by her personal representative is to the \$1,000 which, by sec. 12, is given to the widow if the whole estate is under that sum, or is made a charge thereon in her favour if over that amount.

The debts of the estate absorbed the personal estate.

Under sec. 12, if the estate consists of personalty, and is not of the value of \$1,000, the whole of it goes to the widow. If over that amount, the \$1,000 becomes a first charge, and the Statute of Distributions (now sec. 30 *et seq.* of the Devolution of Estates Act) applies to the balance. But, if the estate or any part of it consists of real property, the widow's dower and her interest in the personalty under the Statute of Distributions is, *primâ facie*, what she takes as her share. If she prefers the \$1,000, she must elect to abandon her dower, as, on her choice being so made, the whole estate is governed by sub-secs. 1 and 2 of sec. 12. And she must indicate her choice by a formal document. Unless she does this, she remains entitled to her dower in the lands, and the section does not operate to increase her rights as to the personalty. As the widow not only did not elect against dower but has enjoyed that right and interest in specie, her estate is not entitled to anything further under sec. 12.

The conclusion of the learned Judge is correct and should be affirmed.

LENNOX, J.:—Emancipated from the spell of Mr. MacBrayne's ingenious argument, I can find no reason to doubt the correctness of the judgment in appeal.

Isaac Oliphant, whose estate is being administered, died without issue and intestate on the 20th January, 1916, leaving real

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and personal estate. His widow, Maria Oliphant, obtained administration and remained in possession of the real estate until her death. The personal estate was exhausted in payment of debts.

The widow did not, in pursuance of sec. 9 of the Devolution of Estates Act, R.S.O. 1914, ch. 119, elect to take an interest, under sec. 12 of the Act, in her husband's undisposed of real estate, in lieu of dower; and I suppose it may be inferred that she did not, as personal representative, give notice in writing requiring the widow to make her election under sub-sec. 2 of sec. 9.

There being real estate, she could take under the statute only by a formal election in writing duly attested: sec. 9 and sub-sec. 4 of sec. 12. Instead, she took and exhausted her estate of dower, and all her rights in her husband's estate terminated at her death.

There is very little room for argument. The widow was not deprived of dower (sec. 9), and she could, if she liked, have a statutory share in lieu of it (sec. 9 and sec. 12, sub-sec. 4). She could not have both; she did nothing beyond taking and enjoying her dower, and sec. 9 expressly provides that "unless she so elects she shall not be entitled to share in the undisposed of real property."

The appeal should be dismissed.

LATCHFORD, J.:—I agree in the result.

Appeal dismissed with costs.

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[IN BANKRUPTCY.]

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Nov. 24.

RE TORONTO METAL AND WASTE CO.

Bankruptcy—Claim of Crown for Sales Taxes—Bankruptcy Act, sec. 51 (6)—Fees and Expenses of Trustee—Priority—Prerogative of Crown—Assignment to Authorised Trustee before Making of Receiving Order—Relinquishment of Estate by Assignee in Favour of Trustee Appointed under Receiving Order—Remuneration of Assignee—Preservation of Assets—Quantum of Allowance—Expenditure of Trustee—Costs of Execution Creditor and Fees and Expenses of Sheriff Seizing before Receiving Order—Poundage—Bankruptcy Act, sec. 11, as Amended by 10 & 11 Geo. V. ch. 34, sec. 6, and 11 & 12 Geo. V. ch. 17, sec. 10—Con. Rule 686 (1).

A trustee in Bankruptcy is entitled to retain his fees and expenses out of the estate in priority to the Crown's claim for sales taxes. The Crown's priority for taxes, which is preserved by sec. 51 (6) of the Bankruptcy Act, does not depend upon any lien or charge upon the bankrupt estate; the Crown has a prerogative right to be paid upon a distribution in bankruptcy in priority to other unsecured creditors; but it is merely a right of preference in the administration of the estate.

Before the making of the receiving order in this case, the debtor-company made an assignment to an authorised trustee, one T., who had no knowledge that a bankruptcy petition had been filed, as in fact it had, before the assignment. Upon discovering that a receiving order had been made, T. relinquished possession of the estate to S., the trustee appointed under the receiving order:—

Held, that T., having acted innocently, ought to receive remuneration for his services, the amount to be fixed having regard to the extent to which those services had helped to preserve the assets for the trustee under the receiving order; and the amount must be treated as an expenditure of the trustee, ranking ahead of the claim of the Crown.

The petitioning creditors had recovered judgment and issued execution against the debtor-company; under the execution the sheriff seized goods of the debtor-company; and, the execution not being satisfied within 14 days thereafter, the petition in bankruptcy was filed:—

Held, that the trustee must pay the sheriff's fees and charges, including poundage, and the costs of the execution creditor, out of the estate, in priority to all other charges or claims: sec. 11 of the Bankruptcy Act, as amended by sec. 6 of 10 & 11 Geo. V. ch. 34 and by sec. 10 of 11 & 12 Geo. V. ch. 17; Rule 686 (1) of the Rules of the Supreme Court of Ontario, 1913.

MOTION by George A. Stephenson, an authorised trustee in bankruptcy, appointed trustee of the estate of the above named company, under a receiving order, for directions as to questions arising in regard to the disposition of the estate.

October 14. The motion was heard by ORDE, J., in Chambers.

L. M. Singer, for the applicant.

W. G. Thurston, K.C., for the Attorney-General for Canada.

B. Luxenberg, for the Sheriff of Toronto.

P. E. F. Smily, for John L. Thorne.

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November 24. ORDE, J.:—This motion raises directly the question upon which I touched in my judgment in *Re F. E. West & Co.* (1921), 50 O.L.R. 631, namely, whether the Crown's priority for taxes, which is preserved under sub-sec. 6* of sec. 51 of the Bankruptcy Act, entitles the Crown to rank ahead of the trustee's fees and expenses. I suggested there that, as the collection of the taxes of which the Crown reaps the benefit must under the circumstances be made through the medium of the bankruptcy, it would seem to be wholly unreasonable and unfair that the Crown should be entitled to take advantage of the administration of the estate by the trustee without being subject to the expense incidental to such administration.

There is no parallel between the position of the Crown under sub-sec. 6 of sec. 51 and that of the landlord under sec. 52. The landlord's right to priority depends upon the right of distress, a right in the nature of a lien; and, as already held in *Re Auto Experts Limited* (1921), 49 O.L.R. 256, 59 D.L.R. 294, that right is superior even to the trustee's fees and expenses. But the claim of the Crown does not depend upon any lien or charge upon the bankrupt estate; the Crown has a prerogative right to be paid upon a distribution in bankruptcy in priority to other unsecured creditors. As pointed out in the *West* case, this prerogative is quite distinct from that which, prior to the adjudication in bankruptcy or to the making of an authorised assignment, might have been exercised by the process of a writ of extent: *Commissioners of Taxation for New South Wales v. Palmer*, [1907] A.C. 179. The prerogative is one which the Crown is entitled to assert in the bankruptcy proceedings. But in bankruptcy (whether the administration is under a receiving order or under an authorised assignment) the property in the debtor's estate has passed to the trustee; the right to issue a writ of extent is gone; and the only prerogative left to the Crown is that already mentioned. The prerogative is, therefore, merely a right of preference in the administration of the estate.

No authority was cited for the contention that this prerogative went the length of depriving the trustee of his fees and expenses. And I see no ground whatever for holding that it does so. Mr. Thurston argued that the words in sub-sec. 6, "Nothing

*(6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

in this section shall interfere with the collection," etc., must be construed to mean that the priority given to taxes, rates, and assessments coming within its provisions, is superior to any of the payments mentioned in sec. 51, and consequently superior to the trustee's fees and expenses. There may perhaps be cases where the right to collect taxes, etc., is such as to be superior to the trustee's fees and expenses. If there are, I think it will be found that the right is in the nature of a charge or lien upon the bankrupt estate existing at the time of the bankruptcy, or continuing, or perhaps even attaching, afterwards. But it would be most unjust to hold that a right to preferential payment in the administration of the bankrupt estate, based merely upon the prerogative right of the Crown to be paid its debts before that of a subject—see the *Palmer* case at p. 184—is really more than a right to be paid preferentially out of the fund realised by such administration for distribution among the bankrupt's creditors. I have been unable to find any English decision directly in point, but I cannot believe that it would be held that the Crown could reap the benefit of the trustee's services without being subject to the payment of his fees and expenses. To hold that the prerogative right is thus limited does not, in my judgment, in any way conflict with the opening words of sub-sec. 6. If the right is as I hold it to be, then nothing in the section does interfere with it.

I hold, therefore, that the trustee is entitled to retain his fees and expenses out of the estate in priority to the Crown's claim for sales taxes.

Another question raised on this motion is as to the fees and expenses of John L. Thorne, to whom the insolvents made an assignment before the making of the receiving order. The petition in bankruptcy was filed on the 16th March, 1921. On the 24th March, 1921, the insolvents made an authorised assignment to Thorne, an authorised trustee. On the 29th March, 1921, a receiving order was made upon the petition of the 16th March, George A. Stephenson being appointed trustee. On the 6th April, 1921, the assignment was registered in the office of the Registrar in Bankruptcy. Whatever knowledge of the bankruptcy petition the insolvents may have had when the assignment was made on the 24th March, it seems to be clear that the trustee Thorne knew nothing of it; and, on the other hand, the petitioning creditors were likewise unaware, when the petition came on before the Registrar for adjudication on the 29th March, that an assignment had been made. Upon discovering that a receiving order had been made, Thorne relinquished possession of the estate to Stephenson, the latter undertaking to pay Thorne's fees, amounting to \$130, if approved by the Court.

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To the extent that Thorne's fees are properly payable out of the estate, they must necessarily be treated as an item in the expenses incurred by the trustee, and so ranking ahead of the Crown's claim for taxes. It will be unfortunate if the execution of an assignment and the consequent incurring of expense by one trustee thereunder, however innocent he may be, should increase the expenses of administration. But the Act contemplates the possibility of an assignment being made before the making of the receiving order: see sec. 9. I commented upon this feature of the Act in *Re Croteau and Clark Co. Limited* (1920), 48 O.L.R. 359, 55 D.L.R. 413.

If there were evidence to shew that Thorne had accepted and acted upon the assignment with notice of the pending petition in bankruptcy, I would hold that he had disintitiled himself to any fees. But, having acted innocently, he ought, to the extent that his work helped to preserve the assets for the trustee under the receiving order, to receive some remuneration. The general costs of the administration ought not, however, to be substantially increased by any such allowance. Strictly speaking, in cases like the present, there ought to be some method whereby the fees ordinarily payable to one trustee should be equitably apportioned between the two trustees. It seems hardly proper that the estate should be called upon to pay full fees to the present trustee and in addition a substantial sum to Thorne. Perhaps an abatement on both sides may bring about a satisfactory result. I leave the matter with this suggestion to those interested, including of course the Crown, which is entitled to see that the expenses are kept as low as possible. If the matter cannot be adjusted, then the parties may speak to me again. But the amount of Mr. Thorne's fees, when settled, must be treated as an expenditure of the trustee, ranking ahead of the claim of the Crown.

There was also a third question as to the sheriff's claim for poundage and expenses. The petitioning creditors were a firm of Baker & Becherman. They had issued an execution against the insolvents, directed to the Sheriff of Toronto, upon a judgment for \$1,359.03 recovered against the insolvents. The sheriff seized goods of the insolvents of the value of \$1,000 and upwards; and, the execution not being satisfied within 14 days thereafter, the petition in bankruptcy was filed, the available act of bankruptcy being the failure to satisfy the execution, under sec. 3 (e) of the Act.

Section 11, as amended by sec. 6 of 10 & 11 Geo. V. ch. 34 (1920) and by sec. 10 of 11 & 12 Geo. V. ch. 17 (1921), makes provision for the protection of the sheriff and of the execution creditor as to their respective costs and fees, when the sheriff

is obliged by virtue of the proceedings in bankruptcy to deliver the goods taken in execution to the trustee, and sub-sec. 3 entitles the sheriff to be paid his fees and charges and the costs of the execution creditor upon delivering the goods to the trustee. This right is given by way of a lien upon the goods, which lien is preserved by sub-sec. 1 (as enacted by the two amending Acts mentioned above). This charge or lien necessarily depreciates the value of the estate available for distribution among the creditors to that extent; and, for the reasons already given, I see no ground for holding that the Crown's prerogative right to be paid its taxes out of the fund available for distribution among the creditors can in any way deprive the sheriff and the execution creditor of the benefit of their lien.

It is true that sub-secs. 1, 2, and 3 of sec. 11 seem particularly designed to protect an execution creditor who, because of the supervening bankruptcy, whether at the instance of some other creditor, or by virtue of an authorised assignment, is suddenly deprived of the prospective fruits of his judgment and execution, but I see no reason why they should not extend to cases where the execution creditor himself becomes the petitioning creditor. The sheriff should not be affected by any distinction between the case of a receiving order made on the petition of the execution creditor and that of an order made on the petition of some other creditor. And, if the costs of the first execution creditor are to be paid by virtue of his lien where such execution creditor is other than the petitioning creditor, I can see no reason why, because the execution creditor follows up his seizure by a petition in bankruptcy, he should be in any inferior position. I am, therefore, of the opinion that the sheriff's fees and expenses and the costs of the execution creditor are to be paid by the trustee in priority to the Crown's claim.

Some question was raised as to the amount to which the sheriff is entitled. In addition to his fees for receiving and filing the writ of execution and the "expenses paid" (presumably for a man in possession and other like expenses), he claims the sum of \$60 for poundage. The Act makes no express mention of poundage. The question of the allowance of sheriff's poundage under this section was recently before the Court in Saskatchewan in *Moroschan v. Moroschan* (1921), 59 D.L.R. 353, 1 Can. Bkey. R. 493, but the points involved were really matters of procedure.

Section 11 recognises and preserves the lien of the sheriff for his fees and charges, and also that of the execution creditor for his costs. So far as the execution creditor's costs are concerned, the section really has the effect of creating a lien, rather than of preserving a lien already existing, because, as pointed out by

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Osler, J.A., in *Ryan v. Clarkson* (1889), 16 A.R. 311, at p. 315, it is not strictly accurate to speak of the lien of an execution creditor upon goods seized by the sheriff. The only question which can arise here is whether or not the sheriff is entitled to poundage and if so upon what footing. That the sheriff is entitled to poundage when the seizure has been made prior to the filing of the bankruptcy petition is, I think, clear upon authority and under the provisions of Consolidated Rule 686 (1). The Rule allows poundage where the goods are not sold "by reason of satisfaction having been otherwise obtained, or from some other cause." The stay in the sale under the execution by virtue of sec. 11 of the Bankruptcy Act is a "cause" within the meaning of the Rule. The sheriff here claims \$60 for poundage. The principle laid down in the Saskatchewan case above mentioned seems sound, namely, that the taxation of the amount is a matter for the Court from which the execution issued. In the present case, if the trustee or the Crown thinks the amount claimed by the sheriff is too large, he or it is at liberty to have it taxed or determined in the ordinary way. But, subject to such taxation, the trustee must pay the sheriff's fees and charges, including poundage, and the costs of the execution creditor, out of the estate, in priority to all other charges or claims.

There will be an order upon the three questions involved as indicated above.

The costs incurred by the sheriff, which I fix at \$20, ought to be paid out of the estate.

I make no order as to costs as between the Crown and the estate. The trustee will be entitled to his costs out of the estate, if there are sufficient assets left after satisfying the claim of the sheriff and the costs of the execution creditor.

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[ROSE, J.]

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Nov. 26.

RE COX.

Will—Division of Residue of Estate—Funds Realised from Properties in England and in Canada—Equal Division between two Hospitals one in England and one in Canada—Transmission of Funds back and forth—Prohibition of Export of Gold—Abnormal Rate of Exchange—Depreciation of Currency—"Loss on Exchange."

The testator, domiciled in Ontario, left a large estate; about one-half of his property was situated in England and the other half in Canada and the United States. By the will, made in Ontario, the property was given to the executors in trust to convert, and pay certain legacies and annuities, and, subject to the legacies and annuities, to divide the residue, as it should become free, in equal parts between a hospital in Ontario and a hospital in England. Some of the funds derived from the English property being available for division between the hospitals, a question as to the course which the executors ought to pursue in making the division, having regard to the rate of exchange, arose:—

Held, that, when the executors had available in England a sum which they desired to divide between the hospitals, they ought to give one-half of it to the English hospital and with the other half buy Canadian exchange and pay over the proceeds of the draft to the Ontario hospital; and *vice versa* when the executors should have funds available in Ontario.

Under existing conditions—the export of gold being prohibited and the rate of exchange being abnormal—this simple course was not unfair. The abnormal rate of exchange was attributable to the fact that the Canadian and English currencies were both depreciated, but the English to a greater extent than the Canadian. It is a mistake to speak of the difference between \$488.66 and (say) \$430 as the cost of transmitting £100 from England to Canada or as a loss on exchange—there is no loss at all.

MOTION by the executors of the will of R. M. Cox, deceased, upon originating notice, for an order determining two questions as to the effect of the dispositions of the will, arising in the course of the administration of the estate of the testator.

The motion was heard by ROSE, J., in the Weekly Court, Ottawa.

A. E. Fripp, K.C., for the executors.

W. D. Herridge, for St. Luke's Hospital, Ottawa.

November 26. ROSE, J.:—The argument of the questions raised on the originating notice took place some time ago, but the giving of judgment was deferred in the hope that the parties themselves might arrange, as was suggested on the argument, some mode of dealing with the principal question which would be satisfactory to the two hospitals concerned. However, no

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arrangement has been arrived at, and I have been asked to give my judgment.

Two questions are raised by the originating notice: the one, whether the executors can, properly and legally, distribute the residuary estate during the lifetime of the annuitants, and the other as to the method of distribution, having regard to the present abnormal condition of the rate of exchange.

The first question is obviously one that cannot be determined in the absence of representatives of the annuitants, but counsel for the executors said that the executors had made, or would make, such provision for the annuities as that they would feel safe in making certain payments to the hospitals, and it is only as to the second question that the judgment of the Court is required.

The Bootle Hospital was not represented on the argument, but the trustees had caused a letter to be written to one of the executors, in which they stated their willingness to be bound by the opinion of the Court, and set forth a course which they thought ought to be adopted. That letter was directed to be filed as a part of the material upon the motion.

The testator, who appears to have been domiciled in Canada, left a large estate, of which about one half consisted in lands in Canada, and bonds and stocks and other securities in Canada and the United States, the other half being his interests in two firms in England and a comparatively small amount of money on deposit in a bank in England. By his will, which was apparently made in Ottawa, he appointed as his executors two gentlemen therein described as residing in England, but one of whom now lives in Ottawa.

By the will the property, other than a residence in Ottawa, is given to the executors in trust to convert, and pay certain legacies and annuities, and, subject to the legacies and annuities, to divide the residue, as it becomes free, in equal parts between St. Luke's Hospital in Ottawa and the Bootle Hospital in England.

Under arrangements which the executors have made with the firms in England, moneys representing the interests, or the balance of the interests, of the testator in these firms will be paid to the executors from time to time; but the securities in Canada and the United States probably will not be turned into cash for some time, and even after their conversion into cash a considerable period must elapse before the annuities drop, and the whole residue is divided between the two hospitals. The question is as to how, having regard to the rate of exchange, the executors are to proceed with the division between the hos-

pitals of the funds received from time to time from the firms in England, and the other funds which hereafter become available for division.

Cases were referred to on the argument most of which are collected and discussed by the Chief Justice of Ontario in delivering the opinion of the majority of the Court in *Quartier v. Farah* (1921), 49 O.L.R. 186, 64 D.L.R. 37. It appears to me, however, that none of these cases are really of much assistance in dealing with the matter under discussion. They, or most of them, relate to questions as to the rate of exchange applicable where a person is bound to pay a certain sum, at a certain place, on a certain day. Similarly the question dealt with in the cases cited in *Williams on Executors*, 11th ed., p. 1175 and the following, have little application. They, and similar cases which might be cited, relate to legacies of a certain number of pounds, or dollars, or francs. The case in hand is entirely different. It raises a question as to the division into equal parts of the testator's assets, whatever they may be; and, so far as I have been able to discover, the precise point has not been under discussion in any case.

However, it does not seem to me that there is much doubt as to the course which the executors ought to pursue. When they have available in England a sum which they desire to divide between the hospitals, no purpose will be served by transferring it to Ottawa, and making the division from there. The simple course will be to give half of it to the Bootle Hospital, and with the other half to buy Canadian exchange, and to pay over the proceeds of the draft to St. Luke's Hospital, unless, indeed, St. Luke's Hospital prefers to take payment in England, and to keep its money there until the rate of exchange becomes more favourable. And when the executors have funds available in Ottawa which they desire to divide between the two hospitals, the simple course will be to give one half to St. Luke's Hospital, and with the other half to buy English exchange in favour of the Bootle Hospital, unless the Bootle Hospital prefers to accept payment in Canada.

St. Luke's Hospital says that this course will be unfair because, as I understand the argument, if one half of any sum which the executors have in England is given to the Bootle Hospital, and the other half is used in the purchase of Canadian exchange, St. Luke's Hospital will, at the present rate of exchange, receive a sum which, expressed in dollars, will be less than the sum which it would receive if the exchange was normal, and the pound sterling represented \$4.86 2/3 Canadian currency; and similarly that, when moneys in Canada come to be

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divided, if one half of the sum for division is used in purchasing English exchange, the Bootle Hospital will receive sums which, expressed in pounds, are more than it would receive if the exchange was normal. St. Luke's Hospital says, therefore, that the suggested course will, both in the present and in the future (assuming that the exchange does not become normal), give to the Bootle Hospital more than its one half of the funds divided. In this argument there is, I think, a confusion of form with substance, which will be apparent when the reason why the rate of exchange is at present abnormal is considered.

If, when the executors had, say, £200 coming to them, in England, they could get, in payment, 200 sovereigns, and if the export of gold coin was not prohibited, there would be no difficulty: they could give 100 of those sovereigns to the Bootle Hospital and bring the other hundred to Canada and give them to St. Luke's Hospital, when, obviously, each hospital would have exactly the same amount of money. Of course, if conditions were normal—if there was no depreciation of currency either in England or in Canada—the executors would neither receive nor distribute the gold; the transaction would be by cheque and banker's draft. On the purchase of a draft, in England, for an amount, in dollars, equivalent to the £100 available for St. Luke's Hospital, there might or might not be payable a premium, this depending upon the state of trade balances and the like existing at the moment of the transaction. If there was such a premium payable, it may be that it would be proper to charge it to the estate generally, as part of the costs of administration—as the expense of getting into possession in the country of the testator's domicile an asset which was to be handed over to a beneficiary in such country. But the premium, if there happened to be one, would be very small—an amount not exceeding the cost of transmission of specie: at least that is the way economists, for instance Professor Jevons, in "Money and the Mechanism of Exchange," used to state the case in discussing the question of exchange at a time when paper currency was, on demand, redeemed in gold, and there was no prohibition of the export of gold. That kind of premium, however, is not the thing that is responsible for the present rate of exchange as between England and Canada: it may or may not enter into the calculation, and, if it does, I imagine that it would be difficult to discover precisely what its effect is on any given day; and so, because of the difficulty in calculating its effect, and because its effect, if discoverable, is very small, and because before the administration of the estate is completed there will be movements of money to England

from Canada, as well as those which are now about to take place from England to Canada, and finally, because the two hospitals, as residuary legatees, will bear in equal shares any expenses that are thrown upon the estate generally, I think that in the practical administration of the estate the simple and probably the fair thing is to disregard it.

The existing, and abnormal, rate of exchange depends, as I understand it, upon something quite different from the thing that regulates the rate under normal conditions: it is attributable to the fact that the English and Canadian currencies are both depreciated, but the English to a greater extent than the Canadian. The result of this difference in the extents of the depreciation is that if a person in England has what he calls 100 pounds he cannot convert it into something which will be called in Canada 486.66 dollars, as he could if the exchange was at par; what he converts it into will be called in Canada, say, \$430. Nevertheless, I think that one who has in England to-day what he calls 100 pounds has just as much as, and no more than, is possessed by one who has in Canada what he calls \$430 (if that is the amount, expressed in terms of Canadian currency, which £100 paid down in London would produce in Canada); and I think it is a mistake to speak of the difference between \$486.66 and \$430 as the cost of transmitting £100 from England to Canada or as a loss on exchange. I do not think there is any loss at all. Take the hypothetical case with which I started: the executors have, in England, 200 sovereigns, and there is nothing to prevent the export of gold, but the English and Canadian currencies are both depreciated. The executors give 100 sovereigns to the Bootle Hospital and bring the other hundred to Canada and give them to St. Luke's Hospital. Each hospital has then the same amount in gold coin. Each proceeds to convert its gold coin into paper currency, with the result that the Bootle Hospital has more than £100 in paper and St. Luke's Hospital has more than \$486.66 in paper, and, because of the difference in the extents of the depreciation in currency in the two countries, the ratio between what the Bootle Hospital has (expressed in terms of English currency) and what St. Luke's Hospital has (expressed in terms of Canadian currency) is not the same as the ratio between one and $4.86\frac{2}{3}$, but is, say, as one is to 4.30. Is it not clear, notwithstanding the fact that the ratio is no longer that of one to $4.86\frac{2}{3}$, that each hospital has still the same amount of money as the other? If it is clear that this transaction (impossible because gold is not allowed to be exported or converted into paper at a premium) would have left the two hospitals on an equality, after the conversion

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of their gold into the paper currencies of their respective countries, is it not equally clear that they will also be on an exact equality if the executors, receiving, in England, £200 in currency, give one hundred in currency to the Bootle Hospital, and either give the other hundred to St. Luke's Hospital in England, or convert it into Canadian dollars and give the dollars to St. Luke's Hospital? I think it is.

There is another way in which the matter may be tested. Take a case which can really happen, instead of the case as to the transmission of gold coin which I have put, but which cannot happen while the law remains as it is. Suppose the executors to receive their £200 in England in Bank of England notes, and to give £100 in such notes to the Bootle Hospital and to bring the other hundred to Canada and to tender them to St. Luke's Hospital. St. Luke's Hospital might accept them or might say to the executors: "Your duty is to convert the assets of the estate into money which is legal tender in Canada, and to pay us in such money. Proceed, therefore, to convert this asset and give us the proceeds of the conversion." The executors would then sell their Bank of England notes for, say, \$430 in Canadian notes, and would tender the latter. How could St. Luke's Hospital complain? It would be exactly in the position in which it would have been if the executors had brought the whole £200 in Bank of England notes to Canada, and had sold them for \$860 and had given St. Luke's Hospital half of the amount and with the other half had bought a draft on London in favour of the Bootle Hospital.

When the time comes for the division of the Canadian and American securities, the same reasoning will apply: any apparent advantage which the Bootle Hospital may gain will be apparent only, not real.

The answer to the question submitted is that the executors ought to follow the course which I have described as the simple course. The costs of all parties will be paid out of the estate.



[IN CHAMBERS.]

1921.

Nov. 28.

HOWSON v. THOMPSON.

Pleading—Statement of Defence and Counterclaim—Joinder of Issue upon—Notice of Trial—Irregularity—Rule 142.

In an action for the price of goods sold the defendant delivered a statement of defence and counterclaim. The plaintiff did not deliver a defence to the counterclaim, but delivered a mere joinder of issue and at once gave notice of trial:—

Held, that the joinder and notice must be set aside.

By Rule 142, a defendant (which covers a defendant by counterclaim) shall not deny generally the allegations of the statement of claim (which covers a counterclaim) but shall set forth the facts upon which he relies, even if this may involve the assertion of a negative.

Hare v. Cawthrope (1886), 11 P.R. 353, distinguished owing to a radical change in the Rules.

AN appeal by the defendant from an order of the Master in Chambers refusing the defendant's application to set aside a joinder of issue delivered and a notice of trial served by the plaintiff.

November 25. The motion was heard by MIDDLETON, J., in Chambers.

Harcourt Ferguson, for the defendant.

J. M. Telford, for the plaintiff.

November 28. MIDDLETON, J.:—The plaintiff is the assignee for benefit of creditors of the F. W. Fearman Company Limited, of Hamilton. The defendant carries on business in Toronto. The claim is for the price of goods sold and delivered by the Fearman company to the defendant, less a credit given for a balance due upon a commission account.

The defendant filed a defence and counterclaim, which, after setting up matters that are not now important, alleges that the defendant was the agent for the Fearman company and that it was a term of the agency that he should receive a commission of 2 per cent. on all goods sold by the company in Toronto, even when not sold through the defendant as its agent; that the Fearman company sold large quantities of goods in Toronto upon which no commission had been allowed to the defendant; and that, after the assignment, the plaintiff had also sold a large quantity of goods in Toronto, and had not accounted to the defendant for the commission thereon. These allegations are repeated by way of counterclaim, and it is alleged that the amounts due for commission exceed any indebtedness to the

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Fearman company, and it is claimed that an account may be taken of the amounts due by the plaintiff and by the Fearman company, and that the balance due to the defendant may be paid. No defence was filed to this counterclaim, but issue was joined thereon and notice of trial at once given.

If the decision in *Hare v. Cawthrope* (1886), 11 P.R. 353, is still the law, this course is warranted, but the Rules have been radically changed since that decision. Then a general denial of the allegations contained in the statement of claim was regarded as a permissible form for a statement of defence. Now, by Rule 142, it is provided that a defendant (which covers a defendant by counterclaim) shall not deny generally the allegations contained in the statement of claim (which covers a counterclaim), but shall set forth the facts upon which he relies, even if this may involve the assertion of a negative.

I attempted to cross-examine the plaintiff's counsel for the purpose of ascertaining what he thought the defence to the counterclaim, as he had pleaded it, really meant. I was unable to ascertain from him whether he denied the existence of the agreement alleged, or intended to deny that any goods had been sold in Toronto upon which the defendant would be entitled to commission as alleged, or whether his real intention was to assert that the amount for which credit had been given covered all commission earned. The object of the Rule in its present form is to compel the party pleading to set out the facts upon which he really relies. There is nothing to prevent a party from pleading inconsistent defences if he chooses to take the risk of so doing. The defendant may deny that he made the promissory note sued on, and in the next paragraph may plead that he paid it upon maturity. The penalty he certainly incurs is that these inconsistent statements will not both be believed, and his case may suffer at the hearing. Another penalty may be that costs may be refused him because he may fail upon one or other of the issues raised. The optimistic framers of the present Rules thought that much would be accomplished if those pleading could be induced to state, shortly and simply, the facts upon which it was really intended to rely at the hearing.

The joinder of issue will, therefore, be set aside, but the plaintiff will be at liberty to deliver a defence to the counterclaim within a week's time; the notice of trial will, of course, go by the board. The costs will be to the defendant in any event. No substantial harm will be done, as, although the case is thrown beyond the autumn non-jury sittings, the winter sittings will be held a few weeks later.

[IN CHAMBERS.]

1921.

GRAYDON V. GRAYDON.

Nov. 28.

Discovery—Examination of Plaintiff—Defendants Severing in their Defences—Examination by one Defendant without Notice to or Attendance of the other—Right of the other to Re-examine—Limitation on Examination—Purpose and Scope of Examinations for Discovery—Practice.

An examination for discovery is primarily for the purpose of enabling the opposite party to know what is the case he is to be called upon to meet; its second and subsidiary purpose is to enable the party examining to extract from his opponent admissions which may dispense with more formal proof at the hearing.

The Rules contemplate only one examination for discovery of any party in the action. Any party adverse in interest may initiate such examination. Notice of it should be given to all the parties adverse in interest to the party to be examined, so that they may be present upon the examination. The counsel who first examines should then cover the common ground and deal with all matters which relate particularly to his client. Other counsel should then be permitted to deal with matters that have not yet been touched upon and matters that relate solely to their own clients. To have many examinations all covering the same ground would be an abuse of the process of the Court.

An examination for discovery is not intended to be a cross-examination at all—although in a case where a party is supposed to be seeking to conceal the truth he may be cross-examined upon examination for discovery.

Where the action was against three defendants, one of whom severed in his defence from the other two, and the plaintiff had been examined for discovery by counsel for the two, without notice to the third, who was not represented upon the examination, and who desired to have a full examination of the plaintiff on his own account, it was directed that the plaintiff should attend for such examination. but that the examination should be confined to matters not dealt with upon the former examination and matters which might be set up or be intended to be set up against the third defendant alone.

APPEAL by the plaintiff from an order of the Master in Chambers, bearing date the 17th November, 1921, directing the plaintiff to attend and submit to further examination for discovery.

November 25. The motion was heard by MIDDLETON, J., in Chambers.

W. D. McPherson, K.C., for the plaintiff.

G. M. Willoughby, for the defendant Thomas Graydon the younger.

November 28. MIDDLETON, J.:—The fundamental question arising upon this motion is of importance as a matter of general practice.

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Graydon in this action sues two daughters and a son, issue of his first marriage, alleging that, after his second marriage, these defendants conspired together to poison his mind against his second wife and to procure him to make conveyances to them of all his property; that this conspiracy succeeded, and the seeds of distrust bore fruit in the way contemplated, and as the result of the conspiracy he divested himself of all his property by divers conveyances to the defendants. Now awakening to the truth of the situation, and finding that there was no ground for suspecting his second wife, he seeks to have these conveyances set aside as having been obtained from him by the fraud and undue influence of the defendants.

The defendants have severed in their defences—the daughters are represented by one solicitor and the son by another. The plaintiff has been examined for discovery at great length by counsel representing the daughters. Counsel representing the son was not present upon this examination, and apparently had no notice of it. He, however, procured a copy of the examination, and obtained an appointment for the examination of the plaintiff for discovery, and upon the plaintiff attending he proceeded to read to the plaintiff the questions asked upon the former examination, expecting him to repeat the information already given. The matter did not proceed very far before counsel for the plaintiff objected, and the examination was discontinued, the motion before the Master resulting. According to the record of the examination, the plaintiff's counsel based his objection upon the idea that the questions were irrelevant. Before me he says that this was only one of his objections, and that his main objection was that the plaintiff was not obliged to repeat all that had already been sworn to. The first examination is not before me, but I am told that it covers 97 pages of typewriting.

Upon the argument of the motion I suggested to counsel for the son that he should confine himself to matters that had not already been touched upon in the examination had, but this was not agreeable to him, as he said his intention was to cover the whole ground in such way as appeared to him to be most expedient. I have, therefore, to face the question whether, where an action is brought against several defendants, and these defendants sever in their defences, the plaintiff is liable to be examined for discovery, not once, but many times.

It is of course obvious that there may be some things which relate to one defendant alone, and which would in no sense be covered by or be adequately dealt with in an examination had at the instance of the co-defendants. On the other hand, where

a plaintiff is under cross-examination at a trial, and there are several defendants separately represented, it is not the practice to allow each counsel to go over all the ground which is common to the defendants. The counsel who first cross-examines, examines at large, and if his cross-examination covers the whole field another counsel in the same interest is not allowed to traverse it again, but must confine himself to new matter or matter which relates particularly to the client whom he represents.

I think I am on solid ground when I say that the Rules contemplate only one examination for discovery of any party in the action. Any party adverse in interest may initiate such examination. Notice of it should be given to all the parties adverse in interest to the party to be examined, so that they may be present upon the examination. The counsel who first examines will then cover the common ground and deal with all matters which relate particularly to his client. Other counsel should then be permitted to deal with matters that have not yet been touched upon and matters that relate solely to their own client. In this way, I think, justice will be done. The idea that there should be many examinations all covering the same ground is quite erroneous, and such a course is an abuse of the practice of the Court. It must always be kept in mind what the purposes of examination for discovery are. It is primarily for the purpose of enabling the opposite party to know what is the case he is to be called upon to meet, and its secondary and subsidiary purpose is to enable the party examining to extract from his opponent admissions which may dispense with more formal proof at the hearing. To illustrate: in this case the first inquiry upon the examination appears to have been into the date of the first marriage, the date of the death of his first wife, the date of the second marriage, etc. So far as discovery is concerned, the defendant can scarcely need this information; for the secondary purpose of enabling these facts to be readily proved as against the plaintiff, if the defendants should need the proof in the course of their defence, the plaintiffs' admissions are of value; but the admissions once made are just as effectual as if made ten times, and there is no need of pursuing this inquiry at the instance of the son when the facts have been fully stated to counsel for the daughters.

No notice having been given to the solicitor for the son at the time of the examination at the instance of the daughters, I do not think it would be desirable to preclude him from now examining, but I think the examination should be strictly confined within the limits that I have indicated, and that the

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order of the Master requiring the re-attendance of the father for re-examination should be varied by providing that at such re-examination the examining counsel shall not be at liberty to examine upon any matters dealt with upon the former examination, but shall only be at liberty to examine as to new matters and as to any matter which may be set up, or intended to be set up, as against the son, and the son alone.

It is suggested that the son should not be precluded from examination merely because the father has been cross-examined at the instance of the daughters. I might agree were it not for the fact that an examination for discovery is not, and is not intended to be, a cross-examination at all. This seems to be forgotten in the conduct of most examinations, and has given rise to the extraordinary length to which these examinations are continued, which is recognised by all trial Judges as an alarming abuse of a practice which, when properly regulated, is most beneficial.

I realise that care must be exercised in any attempt to suggest any general principles, and I do not intend to lay down as a principle that in a case where a party is supposed to be seeking to conceal the truth, he may not, in some actions, be most rigidly cross-examined on the examination for discovery. Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture, nor should it be regarded as a mere opportunity for solicitors to multiply irrelevant and impertinent questions. Intelligently conducted, an examination should eliminate much waste of time at a hearing; unintelligently conducted and abused by being unduly read at a trial, it is a nuisance well-nigh past endurance.

Under the circumstances, costs may be in the cause here and below.

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[APPELLATE DIVISION.]

1921.

RE SIEVERT.

Dec. 5.

Dec. 22.

Executors—Direction in Will for Sale of Land—Discretion as to Time of Selling—Delay for three Years—Bona Fides—Motion by Beneficiary for Administration Order—Discretion of Court—Refusal of Order—Rule 612.

Under Rule 612 no beneficiary under a trust or will has the right to an administration order: the granting or refusing of an order is in the discretion of the Court; and the Court will not interfere with the discretion which the trustees or executors possess as to the particular time or manner in which they will exercise their power, so long as their conduct is *bonâ fide* and they act fairly between the beneficiaries.

The executors of a will were directed and given power to sell land with full discretion as to the time when they should sell. At the end of a period of more than three years the executors had not sold, and one of the beneficiaries applied for an administration order. It appeared that the executors had good reason for believing that a better price would be obtained if they waited a little longer; and the Court refused to interfere.

Tempest v. Lord Camoys (1882), 21 Ch. D. 571, *Re Burrage* (1890), 62 L.T.R. 752, and *Goodier v. Edmunds*, [1893] 3 Ch. 455, referred to.

MOTION by Louis Frederick Sievert, one of the beneficiaries under the will of Louis Sievert, deceased, for an order for the administration of the estate of the deceased under the direction of the Court.

December 2. The motion was heard by MIDDLETON, J., in Chambers.

J. D. O'Neill, for the applicant.

H. C. Fowler, for the executors.

December 5. MIDDLETON, J.:—The testator died on the 25th August, 1918. By his will he gave his executors full discretionary powers as to the time when they should sell his land, expressly stating that they should not be bound to sell in a year, but when, in the exercise of their discretion, they should see fit.

The only real complaint put forward as a justification for this motion is the fact that the executors have not sold, though more than three years have elapsed.

The land is on Teraulay street, in the city of Toronto; that street is now being developed as a leading thoroughfare; and the executors expect a largely enhanced price owing to the works in hand.

The plaintiff is unfortunately hard up and is ready to sacrifice. The majority of the beneficiaries are against him.

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It is argued that the provision of the will is nugatory or that at most the executors have only two years in which to sell and after that they are in default.

I have read the many cases cited and others. Those relied upon by the applicant go to shew that when money or property is absolutely vested in the object of the testator's bounty any attempt to tie it up and prevent him from receiving it, or from receiving it before a certain age, is nugatory. No case determines that, when trustees are given property with instructions to realise and distribute at such time as the executors think fit, any one beneficiary may demand an immediate realisation if the executors or trustees *bonâ fide* think that realisation should, in the interest of all, be delayed.

All such trustees must understand that the trust is a trust for sale and must not be converted into a trust to hold; but, so long as this is kept in mind and good faith is shewn, the Court cannot interfere and take from the trustees the power the testator has given them.

In *Re Burrage* (1890), 62 L.T.R. 752, Chitty, J., states the position clearly:—

“There is undoubtedly a duty upon the trustees to sell the leaseholds some time. I think their power of sale is coupled with a trust or duty, which the Court will enforce if the trustees neglect to act in a proper and timely manner, but the Court will not interfere with the discretion which the trustees possess as to the particular time or manner when and in which they will exercise their power, so long as their conduct is *bonâ fide* and they act fairly between the beneficiaries.”

In an earlier case, *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571, the same learned Judge had expressed similar views, and his decision was affirmed by the Court of Appeal, consisting of Jessel, M.R., Brett and Cotton, L.JJ., one of the strongest Courts ever constituted, which affirmed the principle that the Court has no power, save in the case of *mala fides* or a refusal to discharge the duty undertaken, to put a control on the exercise of the discretion which the testator has left to the trustees.

Since our Rule* was recast some years ago, no beneficiary has the right to an administration order. It is now discretionary, and the cases cited and many others indicate the principle to be applied.

*Rule 612 of the present Rules (1913) provides that “it shall not be obligatory on the Court to pronounce or make a judgment or order for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order.”

Motion dismissed; the executors to charge their costs against the share of the applicant.

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Louis Frederick Sievert appealed from the order of MIDDLETON, J.

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December 22. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. D. O'Neill, for the appellant, argued that power given to the executors to delay conversion for an unlimited time offends against the law in respect to perpetuities: *Kennedy v. Kennedy* (1913), 28 O.L.R. 1, 11 D.L.R. 328; *Goodier v. Edmunds*, [1893] 3 Ch. 455; *London and South Western R.W. Co. v. Gomm* (1882), 20 Ch. D. 562; *Re Phillips* (1913), 28 O.L.R. 94, 11 D.L.R. 500; *In re Daveron*, [1893] 3 Ch. 421; *Peters v. Lewes and East Grinstead R.W. Co.* (1881), 18 Ch. D. 429; *In re Appleby*, [1903] 1 Ch. 565; *In re Blew*, [1906] 1 Ch. 624; *In re Wood*, [1894] 3 Ch. 381; *Sculthorpe v. Tipper* (1871), L.R. 13 Eq. 232. The appellant was not in as good financial circumstances as those opposing him, and was fairly well on in years; he should not be asked to wait longer for administration of the estate.

H. C. Fowler, for the executors, was not called on.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.O.:—It is perfectly clear, I think, that this power of sale is not open to the objection which has been urged by counsel for the appellant.

In Mr. Farwell's work on Powers, at p. 42, in which he cites the case of *Goodier v. Edmunds*, [1893] 3 Ch. 455, upon which Mr. O'Neill relies, the statement is: "but, if the trust for sale be mere machinery, and the persons who are intended to take can be ascertained within the perpetuity limit, the gift to them will not fail." He refers, as I say, to the *Goodier* case as one of the cases establishing the proposition.

Now, with regard to the other points. The main objection to the course the executors are pursuing is that they do not desire at this moment to sell the property on Teraulay street: their view being that, in consequence of the improvements now taking place in that street, the property will increase very much in value, and that it is not in the interest of the beneficiaries that it should be now sold. They do not propose that there shall be any lengthy postponement of the sale, but to delay it until the effect of what is now happening on that street is seen in improved real estate values, and in the propriety of that view

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 discretion refused this order, I think quite properly.

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The appeal will be dismissed.

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Appeal dismissed with costs.

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 [IN CHAMBERS.]

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Dec. 6.

SHERLOCK V. GRAND TRUNK R.W. Co.

Costs—Appeal to Supreme Court of Canada—Money Paid into Court as Security for Costs—Application of—Money Paid into Court below with Defence.

The plaintiff was ordered to pay to the defendants the costs of an unsuccessful appeal by her to the Supreme Court of Canada. Upon that appeal \$500 had been paid into Court as security on her behalf; it was not her money, but that of friends who had placed it in her solicitor's hands in order that security might be given:—

Held, that the defendants' costs of the appeal to the Supreme Court of Canada (including the costs of the order allowing the appeal) were payable out of the \$500; but the balance was not answerable to the defendants' claim for costs in the Court below.

McKenzie v. Kittridge (1881), 1 C.L.T. 110, followed.

In re Buckwell & Berkeley, [1902] 2 Ch. 596, distinguished.

The sum of \$100 paid in by the defendants with their defence, they admitting liability to that extent, was properly applicable to payment in part of the defendants' costs in the Court below.

MOTION by the defendants for payment out of Court to them of \$500 paid in on behalf of the plaintiff as security upon her appeal to the Supreme Court of Canada, which proved unsuccessful, and of which she was ordered to pay the costs; and also for payment out of \$100 paid in by the defendants with their defence, the defendants admitting liability to that extent. See *Sherlock v. Grand Trunk R.W. Co.* (1920), 47 O.L.R. 473, 48 O.L.R. 237, 54 D.L.R. 524.

December 2. The motion was heard by MIDDLETON, J., in Chambers.

H. A. Harrison, for the defendants.

W. S. Walton, for the plaintiff.

December 6. MIDDLETON, J.:—The \$500 put up as security upon the appeal to the Supreme Court of Canada was not the property of the plaintiff, but of some of her friends, placed in her solicitor's hands to enable security to be given. It is ad-

mitted that the costs of the appeal to the Supreme Court must be paid out of it, and this includes not only the costs taxed in the Supreme Court but the costs of the order allowing the appeal, which were taxed at \$20.

The balance of this money is not answerable to the defendants' claim for costs. Had the money been lent to the plaintiff so that she might be in funds, the case would be different; but this was, as I understand the facts, merely pledged as security for the limited purpose; and, when that purpose is answered, it then remains the property of the original owners. This is in accordance with *McKenzie v. Kittridge* (1881), 1 C.L.T. 110, a case which has been more than once followed, and is not in conflict with *In re Buckwell & Berkeley*, [1902] 2 Ch. 596, which deals with a widely different question.

The \$100 is in a different position. This may be applied on the defendants' costs in the Court below.

No costs of this motion.

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Dec. 12.

Company—General Meeting of Shareholders—Notice of—Requirements of By-law—"At Least 7 Days Previous to the Meeting"—Computation of Time—Ontario Companies Act, secs. 142, 143—Injunction.

A by-law of the defendant company (incorporated under the Ontario Companies Act) provided that notice of the time and place of the holding of the annual or general meeting of the company must be given at least 7 days previous thereto, by delivering the same by mail or otherwise duly addressed to each shareholder at least 7 days previous to the meeting. In alleged pursuance of this by-law, a notice was sent by post-letter to each shareholder on the 6th December of a general meeting to be held on the 13th December:—

Held, that the expression "at least" indicated that the days named must be clear days—the time must be reckoned excluding both the day of the act and that of the event—and the notice did not comply with the by-law.

Regina v. Justices of Shropshire (1838), 8 A. & E. 173, followed.

Morell v. Wilmott (1870), 20 U.C.C.P. 378, distinguished.

Upon the above ground and two other grounds set out below, the defendant company was restrained from holding the meeting.

Sections 142 and 143 of the Ontario Companies Act referred to.

MOTION by the plaintiff for an interim injunction restraining the defendants from holding a meeting of the members or shareholders of the United Farmers' Co-operative Company Limited, a company incorporated under the Ontario Companies Act,

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pursuant to a notice given in the manner stated in the judgment. The plaintiff sued on behalf of himself and all other shareholders of the company.

December 9. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

J. W. Bain, K.C., for the plaintiff.

G. H. Kilmer, K.C., for the defendant the United Farmers' Co-operative Company Limited.

December 12. MIDDLETON, J.:—This is a motion by the plaintiff for an injunction restraining the holding of a meeting of the company pursuant to a notice given in circumstances to be mentioned. The individual defendants had not been served with the writ of summons or notified of this motion, but the defendant company appeared voluntarily, fearing that a motion might be made for an *ex parte* injunction.

The by-laws of the company provide that notice of the time and place of the holding of the annual or general meeting of the company must be given at least 10 days previous thereto, by delivering the same by mail or otherwise duly addressed to each shareholder at least 15 days previous to the meeting.

It is said that the directors passed an amending by-law substituting 7 days in place of 10 days and 15 days mentioned in the original by-law; this amending by-law was passed on the 25th November, 1921, and was sent to the Provincial Secretary by mail and received by him on the 9th December.

Under the charter of the company it is expressly provided that the by-laws of the company or amendments thereto, from time to time, shall not be valid or acted upon until the same, in duplicate, certified by the president and secretary, with the seal of the company, have been filed in the office of the Provincial Secretary.

The notice in question is said to have been mailed to the shareholders on the 6th December, and the meeting is called for the 13th December.

The allegation is that this notice is not sufficient, and several grounds of attack are assigned. First, it is said that the amending by-law could not be acted upon at the time the notice was mailed, because it had not been filed with the Provincial Secretary; second, that, even assuming that the amending by-law is operative, the notice is yet inadequate, as "at least 7 days" means 7 clear days, and from the 6th to the 13th is obviously only 6 clear days; third, upon the same assumption, the notice is inadequate because the by-law must be read in conjunction

with sec. 143 of the Ontario Companies Act, which provides that a notice or other document served by post by a corporation on a shareholder or member shall be deemed to be served at the time when it would be delivered in the ordinary course of post. The by-law, it is said, does not provide that the notice shall be given by mailing at least 7 days previous to the meeting, but by delivering the same at least 7 days previous to the meeting. The delivery by registered mail is justified by sec. 142, but the time of delivery is that indicated by sec. 143.

After careful consideration, I have come to the conclusion that all these contentions are well-founded, and that there is no course open to me but to grant the injunction asked.

I do not know that it will serve any useful purpose to discuss the first and third grounds, as the provisions of the law referred to appear to me to be too plain to admit of controversy.

With reference to the second ground, that the expression "at least" indicates that the days named must be clear days, I refer to what I regard as the leading case upon the subject, *Regina v. Justices of Shropshire* (1838), 8 A. & E. 173, which decides that, where an act is required by statute to be done so many days "at least" before a given event, the time must be reckoned excluding both the day of the act and that of the event. This was a carefully considered decision of Lord Denman, C.J., Littledale, J., Patteson, J., and Coleridge, J.

The Chief Justice said: "We may regret the decision we have to pronounce in the particular instance; but it is much best not to shake a rule settled by former decisions."

The learned Judges indicate that if the matter had not then been long-settled they might have arrived at a different conclusion. I think it is better for me, on this question, to follow that which was regarded as a settled matter for one hundred years, and adopt the view which has been acted upon ever since. I do not think that any case since then has shaken this principle.

In the case referred to by Mr. Kilmer, *Morell v. Wilmott* (1870), 20 U.C.C.P. 378, this case and others were cited as deciding the precise point. It is true that, in dealing with the question then before the Court, an opposite conclusion was arrived at, but that was because the provisions of the statute which governed the matter then under consideration had this effect and overruled the earlier law. In none of the cases that I have found has there been more than an endeavour to get away from the settled law by reason of some statutory provision indicating that it was not to apply.

As this decision disposes of the whole subject-matter of the litigation, there is no reason why the action should continue;

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and I therefore direct that this motion be turned into a motion for judgment, and that there should be judgment against the company restraining the holding of the meeting. Inasmuch as the other defendants have not been served, no order should be made concerning them, and no costs should be awarded against them.

It would seem an absolutely unnecessary thing to serve these individual defendants now, for they will be in effect bound by the injunction awarded against the company.

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Dec. 13.

[IN BANKRUPTCY.]

RE HACHBORN.

Bankruptcy—Claims of Creditors against Estate of Insolvent—Damages for Insolvent's Refusal to Accept Goods which he had Contracted to Purchase—Loss Sustained upon Resale—Right to Prove upon Estate for—Determination by Trustee of Value of Claims—Bankruptcy Act, sec. 20—Bankruptcy Rule 119.

Before making an authorised assignment to an authorised trustee under the Bankruptcy Act, the insolvent had refused to accept goods which he had contracted to purchase from several vendors, who claimed against the insolvent estate as damages the loss sustained by them upon the resale of the goods:—

Held, that, the exercise of the right of resale having been forced upon the vendors by the purchaser's breach of contract, without fault on the part of the vendors, they were entitled to prove their claims against the insolvent estate for such damages as they would have been entitled to recover against the insolvent himself; and the trustee should proceed, under sec. 20 of the Bankruptcy Act and Bankruptcy Rule 119, to determine the value of each claim.

Griffiths v. Perry (1859), 1 E. & E. 680, and *William Hamilton Manufacturing Co. v. Hamilton Steel and Iron Co.* (1911), 23 O.L.R. 270, distinguished.

Ex p. Stapleton, In re Nathan (1879), 10 Ch. D. 586, applied.

APPEAL by certain creditors of E. G. Hachborn, an insolvent who had made an authorised assignment to an authorised trustee under the Bankruptcy Act, from the disallowance by the trustee of certain claims against the estate of the insolvent for damages caused by the insolvent's refusal, prior to the assignment, to accept goods which he had contracted to purchase, the damages being the loss sustained by the vendors upon the resale of the goods.

December 12. The appeal was heard by ORDE, J., in Chambers.

*R. S. Robertson, K.C., V. O. Matchett, G. B. Balfour, and
H. W. A. Foster, for the appealing creditors.*

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A. W. Ballantyne, K.C., and T. A. Rowan, for the trustee.

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December 13. ORDE, J.:—The trustee has disallowed a large number of claims against the insolvent estate for damages caused by the insolvent's refusal, prior to the assignment, to accept goods which he had contracted to purchase, the damages being the loss sustained by the vendors upon the resale of the goods. It is said that the circumstances under which the alleged breaches of the respective contracts arose are not the same in all instances, the trustee taking the ground in certain cases that the vendors acquiesced in the cancellation or repudiation of the contract, so that there was not in fact any breach of contract upon which to base a claim for damages. But the trustee has raised a question which, in the absence of evidence as to the circumstances of any one case, may be regarded as to some extent academic, but which from the statements made upon the motion will in all probability be involved in several of the appeals, and must therefore be disposed of sooner or later. And it is suggested that my ruling upon the point may facilitate the administration of the estate.

The trustee contends that the cancellation or repudiation of the contract for the purchase of the goods and the consequent resale thereof by the vendor, followed shortly afterwards by the bankruptcy of the purchaser, has not only not damaged the vendor, but has in fact enured to his benefit, because, had the goods been delivered to the debtor prior to the assignment, the dividend which the vendor would have received on the administration of the estate upon his claim for the whole purchase-price would be less than the amount which he has realised upon the resale, and that, having sustained no damage at all, it would be inequitable in such circumstances to allow the creditor to prove for the full damages which he would be entitled to claim against the purchaser had he remained solvent.

Mr. Ballantyne admitted that he could find no authority directly in point, but he based his argument upon the principles laid down in *Griffiths v. Perry* (1859), 1 E. & E. 680, and *William Hamilton Manufacturing Co. v. Hamilton Steel and Iron Co.* (1911), 23 O.L.R. 270, and the cases there referred to. In those cases the trustee in bankruptcy and the liquidator of an insolvent company sought to enforce the completion by the vendor of his contract to deliver certain goods to the insolvent purchaser or to recover from him the value of the goods, the vendor having at the same time a claim against the insolvent

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for moneys due for goods already supplied. And it was held that the trustee could recover no more than nominal damages for the vendor's breach of his contract to deliver the goods, because it would be inequitable to require him to do so except upon payment in full not only of the purchase-price for the goods undelivered, but of the moneys already due by the insolvent purchaser. As Boyd, C., puts it in the *Hamilton* case, 23 O.L.R. at p. 284:—

“It is not equitable to leave the sellers to resort to such dividend as they may get in liquidation, and allow the liquidators to make profit out of the unfulfilled part of the beneficial contract.”

The trustee urges that some such equitable principle should be applied here, and that the vendor should not recover other than nominal damages for the bankrupt purchaser's breach of contract. However plausible such an argument may be, I cannot see how it can be applicable here. The fundamental distinction between the two cases is this. In the cases relied upon by Mr. Ballantyne, whether the refusal by the vendor to deliver the goods is based upon a right analogous to that of stoppage *in transitu* as suggested in *Griffiths v. Perry*, or upon the right to treat the contract as at an end as suggested by Middleton, J., in the *Hamilton* case, the failure to perform the contract according to its terms arose by reason of the purchaser's insolvency, and because of that the Courts say that the insolvent's estate shall not be allowed to benefit as a result, but that, if the estate seeks to enforce the debtor's contract, it must do so upon the same terms as would be imposed upon the debtor himself. But in the present case the creditor-vendor who is asserting a claim against the insolvent estate is in no way in default. The contracts were broken by the purchaser, and in seeking to prove the damages arising from the purchaser's breach there is no foundation for the application of any equitable principle whatever as against the vendor, who has been guilty of no default but is exercising his legal rights. If, in the present case, instead of the purchaser's having repudiated or broken his contract by refusing to take the goods, the circumstances had been such that the vendor had rightfully exercised his right of stoppage *in transitu* or *ante transitum*, the vendor would have been entitled to claim damages for the loss sustained upon the resale and to prove in the bankruptcy therefor: see Halsbury's Laws of England, vol. 25, pp. 263 *et seq.*; *Ex p. Stapleton, In re Nathan* (1879), 10 Ch. D. 586. If the vendor has that right when he voluntarily exercises his right of stoppage, he is surely not placed in a worse position because the exercise of his right of

resale has been forced upon him by the purchaser's breach of the contract.

When carefully examined, Mr. Ballantyne's authorities not only do not support, but really answer, his contention. The judgment of Jessel, M.R., in the *Stapleton* case is as applicable to the case of a deliberate repudiation of the contract as it is to the implied repudiation arising from the purchaser's insolvency and consequent inability to buy, to which the Master of the Rolls refers.

The disallowance by the trustee of the claims upon the ground dealt with on this motion must be reversed, and the vendors will be entitled to prove their claims against the insolvent estate for such damages as they would have been entitled to recover against the insolvent himself. The trustee will therefore proceed, under the provisions of sec. 20 of the Bankruptcy Act and Bankruptcy Rule 119, to determine the value of each claim. In so far as it may be necessary to do so, the time for formally appealing from the trustee's disallowance of the claims in question, which has already been extended, will be further extended for such a period as may be necessary to protect them and avoid the incurring of costs.

The costs of the creditors who appeared on this motion will be paid out of the estate, as will also the costs of the trustee.

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[IN BANKRUPTCY.]

Dec. 13.

RE CANADIAN CEREAL AND FLOUR MILLS CO. LIMITED.

Bankruptcy—Authorised Assignment by Incorporated Company—Continued Corporate Existence of Company—Powers of Directors and Shareholders—Registration of Transfer of Shares—Issue of Certificate—Shares not Fully Paid-up—Contribution—Payment of Transfer Tax—Meetings of Directors and Shareholders—Passing of Resolutions and By-laws—Bankruptcy Act, sec. 85—Proposal of Corporation under sec. 13—Tender for Purchase of Company's Assets—Delaying Acceptance—Withdrawal—Omission to Notify Certain Creditors under sec. 42 (2)—Necessity for Holding New Meeting—Annual Returns to Provincial Secretary—Ontario Companies Act, sec. 135—Payment of Fees.

An incorporated company which has made an authorised assignment under the Bankruptcy Act has still power, though the scope of its activity is limited because of its inability to carry on its business, to continue its corporate existence, and not as in a merely dormant or moribund state, but so as to express its corporate decisions for all such purposes as may be expedient or necessary.

Such a company may register and give effect to a transfer of shares and issue a stock certificate, signed by the usual officers and under the corporate seal, if the stock is fully paid-up; if not fully paid-up, the question of contribution by the transferring shareholder ought to be dealt with before acceptance and registration of the transfer; but, if the company has undertaken to pay the transfer taxes, that will not justify the trustee in paying the taxes as an item of expense in the bankruptcy—if the transferees are called upon to pay such taxes, they may prove as creditors in the bankruptcy.

The calling and holding of meetings of directors and shareholders and the passing of resolutions and by-laws thereat will still (after the assignment) be regulated by the charter and by-laws of the company: sec. 85 of the Act is applicable to the insolvent company itself.

If the shareholders desire to propose a composition, extension, or scheme of arrangement under sec. 13 of the Act, which they have power to do, the method of conveying the proposal to the trustee must be such as the charter and by-laws, or the shareholders themselves, acting within the charter and by-laws, may provide.

The trustee must be governed by the advice of the inspectors and by ordinary business judgment in delaying the acceptance of any tender for the purchase of the company's assets. The Court has no power to prevent a tenderer from withdrawing his tender, if, by the conditions under which he tendered, he has the right to do so.

If the trustee discovers that he has failed to send to some of the creditors a notice intended to be sent to all under sec. 42 (2), he should notify those who have been overlooked to file their proofs and should advise them of what has taken place: it is not necessary to call a new meeting.

The making of the annual returns to the Provincial Secretary, under sec. 135 of the Ontario Companies Act, is something with which the trustee is not concerned: if the directors and shareholders desire to keep the company alive, they should comply with sec. 135 and pay the fees incidental thereto.

APPLICATION by an authorised trustee in bankruptcy, to whom the above named company, being insolvent, had made an authorised assignment under the Bankruptcy Act, for directions as to certain matters affecting the administration of the estate. The application was made under para. (d) of sec. 18 of the Act, as added by the amending Act of 1921, 11 & 12 Geo. V. ch. 17, sec. 18:—

“(d) An authorised trustee may at any time apply to the Court for directions in relation to any matter affecting the administration of the estate of a bankrupt, an authorised assignor or a debtor who has made a proposal for a composition, extension or scheme of arrangement. The Court shall give in writing such directions, if any, as may be proper according to the circumstances and not inconsistent with this Act, which directions shall bind, as well as justify the subsequent consonant action of, the trustee.”

The Montreal Trust Company, which held certain shares of the insolvent company under certain trusts, was notified of the application.

December 5. The application was heard by ORDE, J., in Chambers.

Hamilton J. Stuart, for the trustee.

R. H. Parmenter, for the Montreal Trust Company.

December 13. ORDE, J.:—The insolvent company had been incorporated and organised to take over the business of an earlier company, and, as the result of certain arrangements, bonds and shares of the new company were delivered and issued to the Montreal Trust Company, whose duty it was to distribute them among the holders of the bonds of the old company upon the surrender of such bonds. Before this distribution was completed, the new company made an authorised assignment under the Bankruptcy Act.

The questions which are now submitted to the Court involve in a broad sense the question, whether and to what extent the assignment affects the status and corporate powers of the insolvent company, and particularly the powers of the directors and shareholders to meet and to decide by resolution upon certain courses of action on behalf of the company.

The Bankruptcy Act contains no provisions corresponding to those in the Dominion Winding-up Act which in effect deprive the shareholders and directors of all further power in the administration of the company's affairs. Under a winding-up order, the affairs of the company are being wound up, so that,

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unless some action of the Court revives the company, it necessarily ceases to exist upon the termination of the winding-up proceedings. See secs. 20 and 31, *inter alia*, of the Winding-up Act.

But under the Bankruptcy Act, except in those cases in which the proceedings are continued under the Winding-up Act, by virtue of Bankruptcy Rule 13 (which Rule is given its effectiveness by sub-sec. 2 of sec. 66 of the Act), a company which makes an authorised assignment is to all intents and purposes in no different position from a natural person. It has parted with all its assets to the trustee, including, by virtue of sec. 36, the right to collect from contributory shareholders. But there is nothing in the Act which destroys its corporate entity or interferes with its power to "function" as a corporation. It is always possible that a corporation may pay its creditors in full, and it is said that that will probably be the result in this case under careful management. It would doubtless be entitled to a discharge in a proper case, though it is obvious that in the great majority of cases the discharge of a company would be a mere formality. Apart from these grounds for believing that an assignment cannot affect the company's status or the powers of the directors and shareholders, there is the fact that under sec. 13 of the Act the insolvent, whether under an assignment or under a receiving order, may always submit to the creditors, through the trustee, a proposal for a composition, or for an extension, or for a scheme of arrangement. And this right is as clearly open to a corporation as to an individual. If so, how can the company authoritatively decide upon or present such a proposal unless its directors and shareholders can meet for the purpose of deliberation? Limited though the scope of the company's activity must necessarily be because of its inability to carry on its business, yet, within the circumscribed ambit of its curtailed powers, it has clearly, in my judgment, still power to continue its corporate existence, and this, not as in a merely dormant or moribund state, but so as to express its corporate decisions for all such purposes as may be expedient or necessary.

With this broad expression of my views as to the effect of the assignment upon the company, I proceed to deal with the questions submitted to me.

1. The company can register and give effect to the transfer of 2,600 shares to the estate of the late Hon. Sidney A. Fisher. There is nothing in the Bankruptcy Act to prevent this.

2 (a). The form of stock certificate to be issued upon the registration of the transfer ought not to vary from the form here-

tofore adopted by the company. The certificate should be signed by the usual officers in that behalf, or such officers as the directors may appoint under the by-laws of the company, and, if desired, the corporate seal should be attached. If the seal and the books of the company are in the possession of the trustee, he should permit their use for the registration of the transfer and the issue of the certificate.

(b) The payment of the Dominion and Ontario taxes upon the transfer is a matter with which the company itself would not ordinarily be concerned. I understand that for the purpose of completing the re-organisation and the exchange of bonds and shares, the company covenanted to pay the transfer taxes. That, however, would not justify the trustee's paying the taxes as an item of expense in the bankruptcy. If in order to complete the transfer the Montreal Trust Company or the transferees of the shares are called upon to pay the taxes, then they may be able to prove as creditors in the bankruptcy under the company's covenant.

3. The company may deal with all transfers of stock in the way already indicated, if the stock is fully paid-up, or, if not paid-up, the question of contribution by the transferring shareholder ought to be dealt with before the company accepts and registers any such transfer.

4. The calling and holding of meetings of directors and shareholders and the passage of resolutions and by-laws thereat will still be regulated by the charter and by-laws of the company. As to the application of sec. 85* of the Bankruptcy Act, while I think it is primarily intended to apply to corporations having dealings with the company and the trustee, I see no reason why it should not also apply to the insolvent company itself.

5. If the shareholders desire to propose a composition, extension, or scheme of arrangement under sec. 13, which, as I have already held, they have power to do, the method of conveying that proposal to the trustee must be such as the charter and by-laws, or the shareholders themselves, acting within the powers imposed by the charter and by-laws, may provide. The Bankruptcy Act presents no difficulties in this regard.

6. The trustee must be governed by the advice of the inspectors and by ordinary business judgment in delaying the acceptance of any tender for the purchase of the company's assets. The Court has no power to prevent a tenderer from

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*85. For all or any of the purposes of this Act, a corporation may act by any of its officers authorised in that behalf under the seal of the corporation. . . .

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withdrawing his tender, if, by the conditions under which he tendered, he has the right to do so.

7. If creditors have been inadvertently omitted from the list of creditors to whom notices were sent under sec. 42 (2) of the Act, I think the trustee should notify them to file their proofs, and, if convenient, notify them of what has already taken place. I do not think he is required to call a new meeting of creditors merely because of the omission.

8. The making of the annual returns to the Provincial Secretary under sec. 135 of the Ontario Companies Act, R.S.O. 1914, ch. 178, is something with which the trustee is not concerned. If my view as to the continuance of the company's corporate status and powers is correct, then the directors, by failing to make returns, might subject themselves to the penalties imposed by the Ontario Companies Act. If the directors and shareholders desire to keep the company alive, then it would seem to be incumbent upon them to comply with sec. 135, and to pay the fees incidental thereto.

The costs of both parties to this application should be paid out of the estate.

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[APPELLATE DIVISION.]

Dec. 16.

RE HUNT AND LINDENSMITH.

Bastardy—Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54, secs. 3 (a), 18, 25—Order of County Court Judge Declaring Appellant Father of Illegitimate Child of Complainant and Directing Payment to her for Maintenance—Right of Appeal—Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4—Leave of Judge—Persona Designata—County Courts Act, R.S.O. 1914, ch. 49, sec. 40—Evidence—Corroboration—Effect of Repeal of Illegitimate Children's Act, R.S.O. 1914, ch. 154, and Enactment of New Statute Covering same Ground—Retrospective Operation of Statutes—Interpretation Act, R.S.O. 1914, ch. 1, sec. 14 et seq.—Child Born before New Act Came into Operation.

In making an order under sec. 18 of the Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54, a County Court Judge acts as *persona designata*: jurisdiction is conferred upon him as a Judge, and he is not, in the discharge of his functions, exercising a jurisdiction which has been conferred upon the Court: see sec. 3 (a) of the Act.

By sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, an appeal to a Divisional Court lies from an order made by a Judge as *persona designata*, upon special leave being granted; and in this case an appeal lay from the order of a County Court Judge declaring the appellant to be the father of a child borne by the complainant, and ordering him to contribute to the support of the child, leave to appeal having been granted by the Judge.

Semble, that sec. 40 of the County Courts Act, R.S.O. 1914, ch. 59, was not applicable.

Held, upon the merits, that the evidence of the complainant was sufficiently "corroborated by some other material evidence," as required by sec. 25 of the Act of 1921.

But that Act had no application to this case, because the child was born before the Act came into operation. The new Act in many of its terms was more onerous than the Illegitimate Children's Act, which it replaced; and a retrospective effect could not be given to it: see sec. 14 *et seq.* of the Interpretation Act, R.S.O. 1914, ch. 1.

An appeal by Lindensmith from an order of ELLIOTT, Co.C.J., of the 15th August, 1921, made under the authority of the Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54, sec. 18 (Ont.), declaring Lindensmith to be the father of a child born to Catherine Hunt, the complainant, on the 29th May, 1921, and ordering him to pay her \$5 a week towards the maintenance of the child.

The appeal was brought, by leave of the County Court Judge, under the provisions of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4. The Act relates to orders made by a Judge as *persona designata*; and sec. 4 provides that there shall be no appeal from any such order unless the appeal is expressly authorised by the statute giving the jurisdiction, or unless special leave is granted by the Judge making the order, or by a Judge of the Supreme Court, in which case an appeal shall lie to a Divisional Court.

November 24. The appeal came on for hearing before MACLAREN and HODGINS, JJ.A., MIDDLETON, J., FERGUSON, J.A., and ORDE, J.

Gideon Grant, K.C., for the appellant.

H. S. White, K.C., for Catherine Hunt, the respondent, raised the preliminary objection that there was no right of appeal in this case, contending that, since a magistrate had the same right as a Judge to make an order such as the one complained of, the Judges' Orders Enforcement Act did not apply, because the anomalous situation would arise that in the case of orders made by a Judge an appeal would lie with leave, while in the case of orders made by a magistrate there would be no appeal.

Grant, in answer to this objection, argued that this was an order made by a Judge as *persona designata*, and the appeal lay, as the Judge gave leave.

Judgment on the preliminary objection was reserved.

Grant, on the merits, argued that the evidence of the plaintiff was not corroborated, as required by (1921) 11 Geo. V. ch. 54, sec. 25: *Radford v. Macdonald* (1891), 18 A.R. 167; *Burbury v.*

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Jackson, [1917] 1 K.B. 16; also that the Act could have no application because the child was born before it came into operation: *Gardner v. Lucas* (1878), 3 App. Cas. 582.

White, in answer, contended that the Act of 1921 only worked a change of procedure from that under the Illegitimate Children's Act, R.S.O. 1914, ch. 154, and that, consequently, the later Act should be taken to be retroactive and applicable in this case: *Gardner v. Lucas*, *supra*, at p 603; Craies' Statute Law, 2nd ed., p. 353. He also argued that there was sufficient corroboration, and referred on this point to *Thomas v. Jones*, [1921] 1 K.B. 22; *Mash v. Darley*, [1914] 3 K.B. 1226; *Harvey v. Anning* (1902), 67 J.P. 73; *Rex v. Baskerville*, [1916] 2 K.B. 658.

Grant, in reply.

December 16. The judgment of the Court was read by MIDDLETON, J. (after setting out the facts as above):—A preliminary objection is taken to the right of appeal. Upon full consideration, I entertain no doubt that an appeal will lie under the Judges' Orders Enforcement Act. The Judge, under the Children of Unmarried Parents Act, 1921, is clearly acting as *persona designata*. The jurisdiction is conferred upon him as Judge, and he is not, in the discharge of his functions, exercising a jurisdiction which has been conferred upon the Court. This, as I understand the cases, is the distinction. This is emphasised when it is found that, by the interpretation clause of the Act of 1921 (sec. 3 (a)), the term "Judge," which is used throughout, is defined as including a Police Magistrate or Judge of the Juvenile Court where the Police Magistrate or Judge of the Juvenile Court has been designated by the Lieutenant-Governor in Council a Judge within the meaning of the Act in question.

It was suggested that, if there was not a right of appeal under this statute, there might be found a right of appeal under sec. 40 of the County Courts Act, R.S.O. 1914, ch. 59, which gives the right of appeal *inter alia* from every decision of a Judge under any of the powers conferred upon him by any statute, unless provision is therein made to the contrary. This section, in my view, has no application to the order in question, because, upon scrutiny of the section, it will be seen that the right of appeal which is thereby conferred is given only to "any party to a cause or matter," and the expressions "cause" and "matter" fall to be interpreted by the interpretation clause of the Judicature Act, R.S.O. 1914, ch. 56, sec. 2 (c) and (n), and would not apply to such a proceeding as this.

For these reasons, I am of the opinion that the appellant is *rectus in curiâ*.

Two questions were argued upon the appeal: first, that the evidence of the complainant was not "corroborated by some other material evidence," as required by sec. 25 of the Act of 1921. There is, in my view, ample evidence to corroborate the complainant's story. The brother-in-law of the girl had two interviews with Lindensmith, accusing him of the paternity. In the first he asked him what he was going to do, as the complainant said that he had promised to pay the hospital fees; his answer was that he would pay as much as he could. He paid \$50. After the child was born, he was again asked what he was going to do about the matter, but said he would pay no more; he had given her \$50, and would "skip out."

A far more serious objection arises by reason of the fact that the child was born on the 29th May, 1921. The Act received the royal assent on the 3rd May, 1921, but did not come into force until the 1st July following.

It is contended that the Act could have no application where the child was born before it came into operation, and in this contention I agree. The Act is drastic in its terms, and for default in payment of the sum fixed by the County Court Judge, the father may be imprisoned. The Act in many of its terms is more onerous than the Illegitimate Children's Act, R.S.O. 1914, ch. 154, which it replaces. The effect of the repeal of a statute and the enactment in its place of a new statute covering the same ground is provided for by the Interpretation Act, R.S.O. 1914, ch. 1, sec. 14 *et seq.* Under these sections, the repeal of any statute does not completely destroy it, but it remains in force for the purpose of continuing any existing right and its enforcement thereunder. The substituted provisions of the new Act do not create a new right or provide a new penalty with respect to matters then past. If the effect of the new Act is to substitute a less onerous penalty or punishment, the more lenient provision is to prevail, but there is no provision which justifies the imposition of a greater liability, or the enforcement, by reason of a more drastic penal provision, of any right which existed before the new Act comes into operation. The strong leaning of the Court against giving any retrospective effect to legislation is well exemplified by the case of Upper Canada College v. Smith (1920), 61 Can. S.C.R. 413, 57 D.L.R. 648.

The appeal should, therefore, be allowed, and the order made by the learned County Court Judge should be discharged without costs.

Appeal allowed. ★

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REX v. SMITH.

Criminal Law—Corruptly Offering Bribe to Peace Officer—Intent to Interfere Corruptly with Due Administration of Justice—Criminal Code, sec. 157 — Mens Rea—Knowledge of Accused that Person Sought to be Bribed was Peace Officer—Misdirection—New Trial—Bail.

The prisoner was convicted under sec. 157 of the Criminal Code of the offence of corruptly offering money to A., a peace officer, with intent to interfere corruptly with the due administration of justice:—

Held (RIDDELL, J., dissenting, and LENNOX, J., expressing no opinion), that the trial Judge erred in charging the jury that it made no difference in law whether the prisoner knew or did not know that A. was a peace officer: knowledge of the fact that A. was a peace officer was an essential element of the offence.

Review of the authorities.

Held, also, by the majority of the Court, that there should be a new trial (LENNOX, J., concurring on the ground that the jury were not sufficiently instructed as to the meaning and effect of sec. 157 and on the ground of the improper admission of evidence of a previous conviction).

Discussion as to the admission of the prisoner to bail pending the new trial.

CASE stated by LOGIE, J., before whom and a jury Cecil Smith was tried on an indictment for corruptly offering money to one Allen, a peace officer, with intent to interfere corruptly with the due administration of justice. The case was stated under an order of the Court, the learned trial Judge having at the trial refused to state a case.

The question asked in the stated case was this: "Was I right in law when I stated to the jury as follows: 'It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned?'"

Section 157 of the Criminal Code is as follows:—

157. Every one is guilty of an indictable offence and liable to 14 years' imprisonment who,—

(a) being a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place, or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime; or

(b) corruptly gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent. App. Div.

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November 29. The case was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

H. J. Scott, K.C., and R. L. Brackin, K.C., for the prisoner. The prisoner was charged under sec. 157 of the Criminal Code, and the question that should have gone to the jury was whether or not the prisoner knew that Allen was a peace officer. *Regina v. Prince* (1875), 13 Cox C.C. 138, L.R. 2 C.C.R. 154, is distinguishable. *Mens rea* is an essential element in this case, and the onus is on the Crown to shew it; this has not been done: *Toppin v. Marcus*, [1908] 2 I.R. 423; *Chisholm v. Douulton* (1889), 22 Q.B.D. 736, at p. 739; *Regina v. Tolson* (1889), 23 Q.B.D. 168, where the *Prince* case is discussed; *Sherras v. De Rutzen*, [1895] 1 Q.B. 918, in which the facts are somewhat similar to those in the case at bar. The prisoner should be admitted to bail, under sec. 1023 (3) of the Criminal Code.

Edward Bayly, K.C., for the Crown, contended that it was unreasonable to suppose that the prisoner would have offered a bribe to Allen unless he had known or supposed him to be a peace officer. He argued that it was impossible that the prisoner should have offered such a large bribe (\$2,000) to one whom he believed to be an employee of an express company. He referred to *Rex v. Kalick* (1920), 33 Can. Crim. Cas. 274, 53 D.L.R. 586.

Scott, K.C., in reply.

December 16. MEREDITH, C.J.C.P.:—The one question expressly asked in this case is: whether knowledge that the person, said to have been offered a bribe, was a peace officer, is an essential element in the crime of which the prisoner has been convicted.

The offence is expressed in the Criminal Code thus: corruptly offers, to a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, any money or valuable consideration, office, place, or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime.

The gravity of the offence is in the attempt to bribe such an officer, in this case a constable, who is, under sec. 2 (26) of the Criminal Code, a "peace officer." There is no offence under the

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Criminal Code unless the person offered the bribe is a "Justice, peace officer, or other officer," employed as before mentioned, even though the intention of the briber be all, and even more, than that expressed in the enactment; and this prosecution is based altogether upon that enactment, sec. 157 of the Criminal Code.

There cannot be corruption under this enactment unless there be such an officer; and there can be no intention to corrupt such an officer unless the person to whom the offer of a bribe is made is known or believed to be such an officer so employed as before mentioned.

The essence of the crime in this case must be an attempt to facilitate the commission of a crime by corrupting a peace officer whose duty it was to prevent it.

All that being so, it is impossible for me to consider that the prisoner is guilty though he did not know that the person to whom money is said to have been offered was a peace officer or in any way charged with the prevention or detection of crime.

As every one is to be considered innocent until proved to be guilty, it must be taken, for the purposes of this appeal, that the prisoner did not know that Allen was a peace officer, the trial Judge having prevented him going to the jury on that question.

That there must be some *mens rea*, some evil intention, in such a case as this—as there must generally in crimes—should be indisputable. There must be, as the enactment expressly provides, among other things, an intention to facilitate the commission of a crime; and, if there must be an evil mind in that respect, why not the graver one of corrupting those in office for the prosecution and detection of crime, who should, far above their fellow-men generally, be uncorrupted and uncorruptible in such things? And, as the giving or offering of the bribe must be with a view to misconduct by the officer as such, how can there be any offence without knowing that he is such an officer? The cases to which we were referred do not help us much, if at all, in determining this case.

But the very question we have to consider has been determined in the State Courts of several of the United States of America; and the rule invariably laid down there is said to be that: knowledge by the accused of the official character of the person to whom the bribe is offered is an essential element of bribery: *Colson v. The State* (1916), 71 So. Repr. 277; *Commonwealth v. Bailey* (1904), 82 S. W. Repr. 299; *The State v. Howard* (1896), 66 Minn. 309; *Pettiti v. The State* (1912), 121 Pac. Repr. 278; and I am quite in accord with the Judges who decided those cases in the conclusion they reached, that knowledge is essential in such a case as this.

If that were not so, then the prisoner would be liable to 14 years' imprisonment, though both he and Allen really believed that the latter was not a peace officer, and though Allen had expressed his willingness to make oath that he was not and never had been; and though the prisoner's story, that he believed Allen to be only a servant of the express company, to which servants it was usual to give money to expedite the delivery of goods, be true.

And, if that be not so, then the word "corruptly," most prominently employed by Parliament in expressly creating the offence of which the prisoner has been convicted, is superfluous, useless, and misleading: "gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent" amply cover the crime.

The officer is corrupted when he accepts a bribe; the briber is corrupted when he attempts thus to pervert justice. It is corruption of the mind, not of the fingers, to which the word "corruptly" is applicable.

And I feel bound to add that the trial, as disclosed in the reporter's notes of it, seems to me to have been quite unsatisfactory. There is no evidence that the prisoner did, or intended to do, anything unlawful with the liquor, or in regard to it; there is no evidence that it should have been unlawful if he had received it from the express company; if the purpose were, as it was sworn to have been, to export it, that was lawful. But, had it been unlawful, it could not have been a crime, and facilitation must be of the commission of a "crime" to bring the case within sec. 157. Nothing like a "crime" has been, or can be, suggested.

Then the punishment is an extraordinarily severe one; greater than that generally imposed upon those who commit grave crimes of a violent or vicious character; and that in a case in which it must now be taken that the offence was committed quite unwittingly.

I would answer the question asked, "No," and would direct a new trial, admitting the prisoner to bail in the meanwhile.

LATCHFORD, J.:—The general principle applicable to such questions as that submitted in the stated case is that, unless the Legislature has indicated a contrary intention, the infliction of penalties for breach of a statute is to be presumed to be confined to cases where the offender has the *mens rea*: Maxwell on the Interpretation of Statutes, 6th ed., p. 188.

In *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207, a publican was convicted under the Licensing Act of 1872, which, by sec. 13, makes it an offence for any licensed person to sell intoxicating

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liquor to any drunken person. It was proved upon the trial that neither the accused nor his servants had noticed that the person served was drunk; that while on the licensed premises the person to whom the liquor was sold had been quiet in his demeanour, and had done nothing to indicate inebriety; and that there were no apparent indications of intoxication. The magistrate held that the offence was complete on proof that a sale had taken place, and that the person served was drunk, and deemed it unnecessary to determine whether there had been on the part of the accused and his servants a knowledge or means of knowledge of the drunkenness. He accordingly convicted the publican. The question stated for the opinion of the Court was whether the construction placed by the magistrate on the section was right, or whether in arriving at his decision it was necessary for him to consider whether or not the appellant or his servants knew or had the means of knowing, or whether they could with ordinary care have detected, that the person served was drunk. Sir James Fitzjames Stephen, in delivering the judgment of the Court, said (p. 209): "I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a *bonâ fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed."

That conclusion was based on the general scope of the Act, which was for the repression of drunkenness, and on a comparison of the particular section with other prohibitory sections in which the word "knowingly" was used.

The latter consideration is not, however, what chiefly determined the mind of the learned Judge. He makes only the passing reference to it which I have alluded to, and proceeds (pp. 209, 210): "The clause we are considering says nothing about the knowledge of the state of the person served. I believe the reason for making this prohibition absolute was that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober. Against this view we have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think the maxim has so wide an application as it is sometimes considered to have."

Then, after referring to *Regina v. Prince*, 2 C.C.R. 154, and *Regina v. Bishop* (1880), 5 Q.B.D. 259, he continues (p. 210): "The substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to

see whether and how far knowledge is of the essence of the offence created."

The object of the section of the Criminal Code under which the appellant was convicted was to prohibit and punish any person who corruptly gives or offers to a peace officer employed in any capacity for the prosecution of offenders any such bribe as money with intent to interfere corruptly with the due administration of justice.

Kalick v. The King (1920), 61 Can. S.C.R. 175, 55 D.L.R. 104, decides that an attempt to bribe a peace officer not to proceed against the party offering it, for breach of a statute analogous to the Ontario Temperance Act, manifests an intention to interfere corruptly with the due administration of justice within the meaning of the section of the Code under which the appellant was prosecuted.

In that case there was no question of the knowledge of the accused that the person bribed was a peace officer.

Here the evidence (incredible as it may seem) is that Smith did not know the person to whom he offered the bribe of \$2,000 was a peace officer. The question for decision is whether the learned trial Judge was right in telling the jury that the prisoner's want of knowledge was immaterial. I would agree in his opinion but for the use in sec. 157 (b) of the introductory word "corruptly" and the inclusion, by reference to para. (a), of the words "with the intent to interfere corruptly."

I am quite unable to see how any person can be said corruptly or otherwise to bribe a peace officer with the corrupt intent of interfering with the administration of justice unless he knows that the person whom he bribes is in fact a peace officer. Intent is an act or state of the mind resulting from a conscious exercise of the will. Necessarily it implies knowledge.

Hence I think the question submitted must be answered in the negative. There should be a new trial of the appellant.

MIDDLETON, J.:—The mental element essential to different crimes differs very widely. In the case of common law crimes it has been defined by an eminent author as a general intention to break the laws which prohibit the criminal act in question: Stroud's *Mens Rea*, pp. 16, 20. Where the offence is statutory, the same author, in a recent article in 37 L.Q.R. 488, speaks of the *mens* as an intention to do the act forbidden by the statute.

There has been much confusion of thought resulting from the failure to distinguish that state of mind which constitutes a defence to a charge of crime at common law from the absence

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of the specific intent made essential to a particular crime by the statute creating the offence.

The distinction is clearly drawn in the judgment of the Privy Council in *Bank of New South Wales v. Piper*, [1897] A.C. 383, where it is first pointed out (p. 389) that it is competent for a Legislature "to define a crime in such a way as to make the existence of any state of mind of the perpetrator immaterial," in which case, if the offence of which the offender is convicted is a venial one, the Judge in the exercise of his discretion may award nominal punishment only. It is then said (pp. 389, 390): "It was strongly urged . . . that in order to the constitution of a crime, whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by shewing that such *mens* did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases in which the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

To much the same effect is the statement of Cave, J., in *Regina v. Tolson*, 23 Q.B.D. 168, 181, where he says:—

"At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the prisoner is indicted an innocent act has always been held to be a good defence. . . . So far as I am aware it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication."

This statement, if taken to apply to all statutory offences, is rejected by the Court of Criminal Appeal in the recent case of *Rex v. Wheat*, [1921] 2 K.B. 119. This was a case of bigamy, where the accused on reasonable grounds and in good faith believed that he had been validly divorced from his first wife, when in fact he had not.

The result of this decision is in effect to adopt the view of Wills, J., in *Regina v. Tolson*, 23 Q.B.D. at p. 173, that most statutes creating offences "are properly constructed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall

take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril."

The tendency of the more modern decisions, as is pointed out by Mr. Justice Stephen in *Cundy v. LeCocq*, 13 Q.B.D. 207, is to regard all statutory offences as being strictly defined by the words of the statute, more particularly when one finds in the statute anything indicating the legislative intention with reference to the motive. In *Cundy v. LeCocq* it was pointed out that the word "knowingly" was used in the definition of certain offences against the Act, while in others it was omitted, and the finding was that this signified an intention on the part of the Legislature that knowledge should be an essential ingredient of the offence only when so provided.

Turning now to the statute in question: in my view, the only matter open for argument is the ascertaining exactly what the statute requires. Eliminating that which is not material and transposing the words of the section (Criminal Code, sec. 157), we find that "every one is guilty of an offence who corruptly gives or offers to any peace officer any bribe with the intent to interfere corruptly with the due administration of justice." The searching by a police officer for information upon which he may lay an information for some supposed breach of the Temperance Act is part of the administration of justice, within the meaning of this section, according to the recent decision of the Supreme Court of Canada in *Kalick v. The King*, 61 Can. S.C.R. 175, 55 D.L.R. 104.

The other statutory requirement essential to guilt is that what is done shall be done "corruptly," i.e., with the object of procuring the police officer to abstain from the discharge of his duty by reason of the bribe tendered or promised to him.

This statutory requirement seems to me to import a moral element into the offence, and I think the learned trial Judge erred when he charged the jury as he did, and that the accused cannot be said to have attempted corruptly to bribe a police officer with the intention of corruptly interfering with the administration of justice unless he had knowledge of the fact that the individual with whom he was dealing was a police officer.

From the evidence given in this case this knowledge might well have been inferred, but this was a question to be determined by the jury, and the Judge could not withdraw the matter from them.

I greatly regret that a new trial must be directed. The accused is now in custody. I do not think that we should deal with the application for bail; but if, on a proper application, bail is granted, care should be taken to see that it is of a most

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substantial character. The charge is by no means a trivial one; if the accused is guilty his offence calls for severe punishment, and it is most desirable in the public interest that there should be a trial, and bail should be in such an amount as to make it certain that the accused will stand his trial.

LENNOX, J.:—The indictment upon which the prisoner was tried and convicted was that he “did corruptly offer to one William Allen, a peace officer engaged in the execution of his duty, a sum of money with intent to interfere corruptly with the due administration of justice.”

The indictment and trial were under sec. 157 of the Criminal Code, para. (b). This paragraph does not speak for itself; to make it intelligible parts of para. (a) must be carried down and incorporated with it. This cannot be evaded, and, having to do this, I take it that this is what the statute specifically declares, namely: “Every one is guilty of an indictable offence and liable to 14 years’ imprisonment who corruptly offers to any peace officer employed in any capacity for the prosecution or detection or punishment of offenders, any money or valuable consideration, with the intent to interfere corruptly with the due administration of justice.” I have included *in extenso* what is incorporated by reference in para. (b).

The question submitted by the stated case is: “Was I right in law when I stated to the jury as follows: ‘It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned?’”

The answer, I think, largely depends upon what else the learned Judge said to the jury, or omitted to say, and, in some degree, upon the evidence and the whole course of the trial, including comments of the trial Judge in the hearing of the jury. I have read it all very carefully.

The case was argued as if everything turned upon the construction of the statute upon one point only, namely, whether the word “knowingly” is to be implied, and supplied, or not. I am of opinion that the answer to the stated case does not depend upon this point alone. Assuming, for the moment, without deciding, that knowledge that the person to whom the money is offered is a peace officer is not *per se* essential, that the crime may be complete without knowledge, still, in my opinion, it would not at all follow that the learned Judge “was . . . right in law” in instructing the jury that “it matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned.” With respect, I am of opinion that it matters a great deal as regards whether

or not the prisoner made the offer with intent corruptly to interfere with the administration of justice.

I am of opinion that this statement of the learned Judge, taken by itself, was wrong in law, whether knowledge is or is not essential, and, unless corrected in other parts of the charge, was misleading and calculated to divert the attention of the jury from other considerations and findings of fact essential to a fair trial of the offence charged in the indictment.

It is therefore necessary to follow out carefully what else was said or omitted by the learned Judge in instructing the jury.

Section 157 was read to the jury, as it is, with all its "aforesaid," and the dictionary meaning of "corruptly" was also read to them. It was not pointed out what is to be read into para. (b) in order to understand its various references to para. (a), as, for instance: "bribe as aforesaid" is to be read as the equivalent of "any bribe with intent," etc., at least, and probably of all the subsequent words of para. (a).

I was not able to satisfy myself as to the completed form and substance of the skeleton (b) without resorting to the device set out; and, making allowance for the "diversity of gifts," I have been wondering whether the jurymen, whether each jurymen, clearly grasped on a single reading what I have found it quite difficult to be clear about, after many readings and a good deal of steady thinking. Did they, for instance, understand or even think about the circumstances that for "offers to any officer aforesaid," they were to substitute "offers to any peace officer employed in any capacity for prosecution or detection or punishment of offenders," and that it was a fundamental condition that they should find as a fact, guided by the instruction of the Judge, of course, as to the legal meaning of peace officer, that Allen was in fact a peace officer, and that, at the time of the alleged offence, he was in fact so employed for the prosecution, detection, or punishment of offenders, before they could bring in a verdict of guilty? Subject to what I have said as to the meaning of "peace officer," these are all questions of fact, and exclusively for the jury; whether a determination of these essential facts was easy or difficult does not matter; they are basic conditions of a conviction, and the jury must be allowed to pass and must pass upon them in reaching a verdict. Did the jury understand, in fact did the jury advert to, these questions at all? I need not answer this question either, for all this was disposed of before the jury retired to consider their verdict. The learned Judge said: "Now, Allen was an officer, I tell you, as a matter of law—Allen was an officer within sec. 157. He was in fact a county constable." These important questions being eliminated,

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I confess I find it difficult to make out just what was left to the jury to determine, if anything. The offer of money was admitted and sworn to by the prisoner. It was essential to a verdict of guilty that the jury should reach the conclusion that as a matter of fact a corrupt offer "with the intent to interfere corruptly with the administration of justice" was made. This was not in any direct or explicit way submitted to the jury—it was not submitted to the jury at all except by a verbatim reading of the whole section; and the jury were left to apply the statute to the facts as best they could. With respect, I do not think this is enough; I do not find in it any guarantee that the jurors were put in a position to consider the relevant facts, and to apply intelligently the provisions of the statute to the facts as they found them. It is quite as important that the trial should be fair as that the verdict should be right. Without a legally fair trial a theoretically *just* verdict of guilty is impossible. It may be that this man is an old offender. He was being tried where his operations, whatever they were, had been carried on, and by a jury drawn from a locality where his reputed doings were notorious. He came to his trial under unfavourable conditions, and he made no attempt to shew that he was a man of general good character. In the case of a man of bad repute, it is, manifestly, more necessary to be on the alert to see that nothing is dragged in that ought to be excluded, than in the case of a man of hitherto unblemished character. What the people are saying outside should be kept outside the courtroom during the trial of an issue, whether civil or criminal.

To the end that this man should have a fair trial, and neither more nor less, it was not essential, I would think, to remind the jury of the supposedly evil reputation of "the border towns," but there is room for a difference of opinion as to this, and quite frequently Judges advert to external conditions to impress upon the jury the gravity of the question they have to deal with.

But the admission of improper evidence is quite another matter. I have pointed out that there was no attempt by the prisoner to pose as a man of previously good character. The course pursued by the Crown at this trial is unheard of in our Courts. It was both irregular and illegal. Where it is competent to give evidence of a previous conviction, and when the time arrives for giving it, the method is regulated by secs. 982, 963, and 964 of the Code. The manner of the giving of this evidence is the least serious phase of the question—there was no right to put in the evidence at all at the trial stage of the proceedings. Sections 963 and 964 are intended to meet cases where the offender is liable to a specific additional penalty

by reason of having committed a second offence of the same character; and the chance of prejudice to the accused, by a premature disclosure of the previous conviction, is carefully guarded against in these sections. Here, the object was obviously to blacken the character of the prisoner in advance, a thing for which there is no legal sanction except where character-evidence is given to offset previous evidence of good character: Roscoe's Criminal Evidence, 11th ed., p. 94; Phipson on Evidence, 6th ed., pp. 186, 187. *Kalick v. The King*, 61 Can. S.C.R. 175, 55 D.L.R. 104, is authority for holding that, although proceedings had not been instituted, the offer of a bribe to an officer employed in the carrying out of the Ontario Temperance Act, other conditions of the section being present, comes within the provisions of sec. 157.

The Chief Justice was good enough to refer me to a number of American decisions, *Pettiti v. The State*, 121 Pac. Repr. 278, *The State v. Howard*, 66 Minn. 309, *Colson v. The State*, 71 So. Repr. 277, and other cases, and I have read them. They establish that, under apparently similar legislation, knowledge that the person bribed was an officer, juror, or as the case may be, is essential and must also be charged in the indictment. I have not found it necessary, as above indicated, to come to a conclusion as to whether knowledge is essential under sec. 157, and have therefore not compared the American statutes with ours. It is to be noted, of course, that the offenders referred to in para. (a) necessarily have knowledge, and para. (b) is *in pari materiâ*. As the question of a new trial arises, I have examined the whole charge and inquired into the trial generally more fully than I would otherwise have done.

Except in the case of a challenge for the defence improperly disallowed, "No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial:" Criminal Code, sec. 1019.

I am of opinion that, within the terms and conditions of sec. 1019, the prisoner Cecil Smith is entitled to a new trial. I am naturally disposed to concur in whatever terms the Chief Justice and my brothers, of greater experience than I have, may impose. As yet I do not know what conclusion they may reach, and it is necessary to be definite; therefore, speaking for myself, I would think there is no hardship in retaining the prisoner in close custody until the trial—the only absolute

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guarantee, to my mind, that he will appear for trial when called upon. There should be no escape from this, if he is alive.

RIDDELL, J. (dissenting):—At the recent sittings of the Supreme Court at Sandwich, Cecil Smith was indicted, the indictment charging “that at the city of Windsor, in the county of Essex, on the 28th day of February, 1921, Cecil Smith did corruptly offer to one William Allen, a peace officer engaged in the execution of his duty, a sum of money with intent to interfere corruptly with the due administration of justice.”

Smith was found guilty and was sentenced by my learned brother Logie to five years’ imprisonment.

The main defence was that Smith did not know that Allen was a peace officer.

My learned brother in his charge to the jury said:—

“It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned. If he knew, so much the worse; but, if he did not know, then the offence is nevertheless completed if he corruptly, with intent aforesaid, actually offered a bribe to a man who was in fact a peace officer.”

Counsel for the defence asked for a reserved case upon the question of law “in order that we might take the opinion of the court of appeal upon that.” Mr. Justice Logie refused, and a motion was made to this Court successfully, resulting in the following case:—

“Was I right in law when I stated to the jury as follows: ‘It matters not, in my opinion of the law, whether Smith knew that Allen was an officer or not, so far as the offence is concerned?’

“And I make a certified copy of the evidence, and also the papers and exhibits at the trial, part of the stated case.”

The only point before us is the simple one, “To constitute an offence against the statute, must the accused have known that the person whom he was attempting to bribe was a peace officer?”

At the common law it was a well-known maxim, “*Actus non facit reum nisi mens sit rea*:” and “*ignorantia facti excusat*”—as the civil law puts it, “*regula est, juris quidam ignorantiam cuique nocere, facti vero ignorantiam non nocere*.” But this rule does not necessarily apply in the case of acts forbidden by statute. Where Parliament enacts a law for the protection of public morals, health, or welfare of any kind, the statute may forbid any act without reference to the intent, to the purpose, or to the knowledge of the actor.

Cases will no doubt be found in which the Court has imported a requisite of the knowledge of fact—for example, the famous case of *Regina v. Tolson*, 23 Q.B.D. 168, decided by nine Judges against five; *Regina v. Sleep* (1861), 8 Cox C.C. 472; *Regina v. Cohen* (1858), 8 Cox C.C. 41. The argument for this course has never been put more forcibly or ably than in the dissenting judgment of Brett, J., in *Regina v. Prince*, L.R. 2 C.C.R. 154, 44 L.J.N.S.M.C. 122—the fact that he stood alone against fifteen Judges makes his judgment none the less cogent and interesting—in another field, “*Athanasius contra mundum*.”

But the whole trend of modern authorities is toward a literal interpretation of statutes—it is supposed that Parliament knew what it meant to prohibit and was sufficiently acquainted with the English language to express its meaning clearly.

In *Regina v. Prince*, *ut supra*, Blackburn, J., giving the judgment of ten Judges, refused to give effect to the argument that “in general, a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime, the intention of the legislature should be presumed to include ‘knowingly’ in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears.” In that case the charge was of taking a girl of sixteen out of her father’s possession and against his will: and Blackburn, J., said (L.R. 2 C.C.R. at pp. 171, 172): “It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril.” Bramwell, B., giving the judgment of eight Judges (Pollock, B., and Denman, J., having also concurred in the judgment of Blackburn, J.), says (p. 174): “The question is, whether we are bound to construe the statute as though the words ‘not believing her to be over the age of sixteen’ were there, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word ‘knowingly’ was there, and for the following reasons: The act forbidden is wrong in itself if without lawful cause; I do not say illegal, but wrong.”

The case of *Regina v. Tolson* and the maxim “*actus non facit reum nisi mens sit rea*” have been considered in the Court of Criminal Appeal in England in two cases in the present year. The first is *Rex v. Wheat*, [1921] 2 K.B. 119. The statute 24 & 25 Vict. ch. 100, sec. 57 (Imp.), provides: “Whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony,” with

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three exceptions, the second being when there has been a divorce of the original spouses. Wheat was found by the jury "to have believed on reasonable grounds" that he had been divorced from his lawful wife. The trial Judge, Mr. Justice Sankey, held that this was no defence; and his decision was sustained by the Court of Criminal Appeal (Bray, Avory, Shearman, Salter, and Greer, JJ.) In giving the judgment of the Court, Avory, J. (p. 125), says:—

"In the case of the second exception there is no indication in the statute that any presumption or belief is to afford any defence; the words do not admit of any such qualification and the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage. If he has not, then at the time of the second marriage he is a person who, being married, intends to do the act forbidden by the statute, namely, 'to marry during the life of the former wife.''" At p. 126, referring to the *mens rea* maxim, the learned Judge says: "In our opinion the maxim in its application to this statute is satisfied if the evidence establishes an intention on the part of the person accused to do the act forbidden by the statute."

A still more recent case is *Horton v. Gwynne*, [1921] 2 K.B. 661. The Larceny Act of 1861, 24 & 25 Vict. ch. 96, sec. 23 (Imp.), provides: "Whosoever shall unlawfully and wilfully kill . . . any house dove or pigeon under such circumstances as shall not amount to larceny at common law" shall be liable to a penalty. Gwynne believed that a homing pigeon which he saw sitting on the ground in a field some distance from him was a wild one, and shot it, thinking that he had the right to shoot it. The Justices of Herefordshire held that he did not thereby incur the penalty of the Act, but reserved a case. Their decision was reversed by the Court (Darling, Avory, and Horridge, JJ.) The argument for the appellant was (p. 662): "No doubt the section does not apply to a wild pigeon . . . But a person who shoots at a pigeon under the belief that it is a wild one takes the risk of its turning out to be a house pigeon." Darling, J. (p. 663): "A person who shoots a pigeon which turns out to be a house pigeon must take the consequences of his act." The other Judges agreed. *Taylor v. Newman* (1863), 4 B. & S. 89, was referred to as supporting the conclusion, as in that case the defendant escaped only because he was acting in defence of his property.

I do not think that the defendant can derive assistance from the case of *Sherras v. De Rutzen*, [1895] 1 Q.B. 918. The appellant, keeper of a public-house, had sold liquor to a police-

man without his armlet, and believed by the publican to be off duty; he was convicted under the Licensing Act (1872), 35 & 36 Vict. ch. 94, sec. 16 (2), for supplying liquor to a constable on duty. The Court (Day and Wright, JJ.) quashed the conviction; but in doing so Wright, J., took occasion to say that the presumption that *mens rea* is a necessary ingredient in a crime is liable to be displaced by the wording of the statute creating the offence.

I am unable to see the relevancy of the case of *Chisholm v. Doulton*, 22 Q.B.D. 736. There the defendant was held not liable in the police court for the negligence of his servant. This decision was sustained. "It is a principle of our criminal law that the condition of the mind of the servant is not to be imputed to the master:" *per* CAVE, J., at p. 741.

A collection of recent American cases on this point, supporting the conclusion at which I have arrived, will be found in 20 Michigan Law Review (November, 1921), pp. 109, 110.

The evidence in the present case wholly justified the jury in finding that the act was done corruptly with intent to interfere with the due administration of justice—the administration of the Ontario Temperance Act. It is not objected, nor do I think it could be validly objected, that the learned trial Judge told the jury that interference with the due administration of the Ontario Temperance Act is an interference with the due administration of justice: *Rex v. Kalick*, 33 Can. Crim. Cas. 274, 53 D.L.R. 586, a judgment of the Court of Appeal for Saskatchewan, affirmed in the Supreme Court of Canada, *Kalick v. The King*, 61 Can. S.C.R. 175, 55 D.L.R. 104.

I can find no ground for holding that the statute contemplated *mens rea* at all. Taking the test suggested in *Regina v. Prince* by Bramwell, B., "the act forbidden is wrong in itself if without lawful cause; I do not say illegal, but wrong." "One who does such an act does it at his peril:" *per* Blackburn, J., L.R. 2 C.C.R. at p. 172.

Nor can the defendant derive any advantage from the word "corruptly." The meaning of this word is explained in *The Bewdley* case (1869), 1 O'M. & H. 16 at p. 19, by Blackburn, J., following the judgment of Willes, J., in *Cooper v. Slade* (1858), 6 H.L.C. 746, at 773.

The defendant did the act corruptly in the legal sense, and undoubtedly with the intent aimed at by the section; the absence of *mens rea* (if it was in truth absent) is immaterial, and I think the charge unobjectionable.

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The question submitted to us should be answered in the affirmative.

Question answered in the negative and new trial ordered (RIDDELL, J., dissenting).

Note: Upon the second trial, the prisoner was acquitted. 4

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[APPELLATE DIVISION.]

COLE V. MERCHANTS FIRE INSURANCE CO.

Insurance (Fire)—Goods “Held in Trust” for another—Agreement of Trustee or Bailee to Insure for Benefit of Bailor—Knowledge of Insurer—Insurance in Name of Bailee—Terms of Policy—Description—Statutory Condition 6 (a)—“Interest of Assured.”

W. carried on a manufacturing business for P., using the name “F. E.W. in trust.” Under an agreement between “F.E.W. in trust” and C. W. manufactured material, supplied by C., into garments. The defendants issued a policy insuring “F.E.W. in trust against direct loss or damage by fire . . . machines and machinery of every description . . . stock in trade of every description, manufactured, unmanufactured and in process thereof, manufactured or dealt in by the assured, their own, held in trust or on consignment or sold but not delivered or removed, all while contained in the three-storey . . . building” in which the business of “F.E.W. in trust” was carried on. The insurance was intended to cover the goods of C., and was procured pursuant to an agreement between W. and C. The defendants, through their agent, knew that the insurance was intended to cover goods which W. did not own, but had upon the premises for the purpose of being manufactured by him: and the words of the policy quoted were those of the defendants and were intended to cover such goods. The goods in the building, a considerable part of which were C.’s, were damaged by fire. W. assigned the policy to C., who brought this action thereon. W. was added as a party plaintiff and P. as a party defendant:—

Held, that statutory condition 6 (a) (the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194), requiring the interest of the assured to be stated in or upon the policy, did not stand in the plaintiffs’ way, and they were entitled to recover upon the policy.

Even if “stock in trade . . . held in trust” meant held in trust for P., it might also mean held in trust for C.—a bailee is commonly, and not improperly, called a trustee for the person whose goods he has in bailment.

Keefer v. Phoenix Insurance Co. (1898-1900), 29 O.R. 394, 26 A.R. 277, 31 Can. S.C.R. 144, referred to.

AN action upon two fire insurance policies.

The action was tried by KELLY, J., without a jury, at London. J. A. E. Braden, for the plaintiffs.

R. S. Robertson, K.C., for the defendants.

September 22. KELLY, J.:—"F. E. Wray in trust," who at the time carried on business as the Canada Overall Company for John Pringle, made a contract of the 17th June, 1920, with the plaintiff Cole, to manufacture certain garments out of material to be supplied from time to time by him, sufficient to enable Wray to manufacture 100 dozen garments per week for a period of three months; the material was supplied accordingly.

Pringle's introduction into the transaction was brought about in this way. In March, 1920, Wray, who was then carrying on this business on his own behalf, made an assignment for the benefit of his creditors, and the assignee sold the assets to Pringle, who was then Wray's creditor to a substantial amount. Pringle then entered into arrangements with Wray by which the latter was to carry on the business for him. After the contract of the 17th June had been entered into, Cole inquired of Wray about insurance, and he replied that he had insurance in force which covered Cole's goods. When Cole made this contract with Wray, he was aware that Pringle was interested in the business, and even had Pringle's assurance that he could safely deal with Wray, who, Pringle said, was running the business for him; and he thus was aware that "F. E. Wray in trust" meant Pringle.

On the 19th September, 1920, the goods in the premises which Wray occupied were seriously damaged by fire. A considerable part of these goods was Cole's. Wray at that time was carrying insurance aggregating \$6,000 or thereabouts, including \$2,000 in the defendant company, represented by two policies, one for \$1,500, dated the 17th July, 1920, and the other for \$500, dated the 17th August, 1920, both issued in the name of F. E. Wray in trust, on "machines and machinery of every description, tools, shafting, gearing and belting, office furniture and fixtures, type-writing and other machines, on stock in trade of every description, manufactured, unmanufactured and in process thereof, manufactured or dealt in by the assured, their own, held in trust or on consignment or sold but not delivered or removed, all while contained in the three-storey first-class roofed building situate and being Nos. 389-393-395 on the west side of Talbot street," etc.

On the 20th September, Wray assigned to Cole two policies of \$500 and \$1,500 respectively (said to be the two policies now sued upon) and all moneys payable thereunder; and on the 4th October, 1920, he made a further assignment to Cole of all his claims and demands under the two policies of the defendant company (and other policies) and all moneys due him thereunder. Both of these assignments were made without Pringle's

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consent. In attempting to take over these policies, Cole intended to claim thereunder and apply any moneys so received upon his loss, and he says that he learned that Pringle also claimed these same moneys. The total of Pringle's claims then amounted to \$645.50.

This action was begun by Cole on the 1st February, 1921, to recover the full amount of the two policies issued by the defendant company. By reason of these conflicting claims, the company interpleaded, and on the 16th March, 1921, an order was made adding Pringle as a party defendant, and granting liberty to the defendant company to pay into Court \$645.50, on which payment the company would be discharged from liability under the policies sued on in respect of certain goods and chattels alleged to be the goods and chattels of F. E. Wray in trust, in the proofs of loss dated the 8th January, 1921. These proofs of loss set forth part of the goods destroyed or damaged as the property of F. E. Wray in trust, and the remainder as the property of Cole. The company paid into Court \$645.50.

By the contract of the 17th June, 1920, Wray agreed also to purchase machinery to the value, as Wray puts it, of \$575. At that time there was insurance upon the goods in the premises occupied by Wray; and at a later date, when the policies were about to expire, Cole and Wray both understood and agreed that the insurance would be continued; and, as the former was the owner of some of the goods then in the premises, a suggestion was made that he should pay part of the premium. Policies were issued accordingly by the defendant company and other companies to an aggregate amount of over \$5,000, the defendant company's part being the \$1,500 policy now sued upon. In August, 1920, in consequence of Cole's goods in Wray's premises increasing in amount, it was proposed that an additional \$500 insurance be issued. The \$500 policy now sued upon was then issued. Wray, prior to his agreement of the 17th June, 1920, had been making up into garments material supplied by other persons; and as early as 1919 the insurance which he carried was in the form above quoted from the policies now sued upon. Jackson, the defendant company's agent at London, with whom this insurance was negotiated, had knowledge in a general way of the manner in which Wray carried on business.

In his statement of defence, Pringle claimed to be entitled to the \$645.50 paid into Court; and, though there is evidence that he had previously repudiated Wray's right or authority to assign any interest in these policies, in his pleadings he ratified and confirmed the assignments to Cole of the policies

and the moneys claimed in this action. This of course was long after the commencement of the action. It is not established that Wray had any right or authority to make the alleged assignments to Cole unless with Pringle's consent, of which there is no evidence except as it appears in the latter's statement of defence. Moreover, there was no direct privity of contract between Cole and the defendant company. To meet the dubious position in which Cole then found himself, application was made at the trial to add Wray as a party plaintiff, his written consent thereto being filed, and I granted the application.

On the facts so far set forth, and summarising the effect of the evidence, the position is that what the defendant company, through its agent Jackson, intended to contract for, was insurance to Wray to cover and protect him against all personal loss from destruction of or damage to goods in which he was personally interested or in which he had an insurable interest, and to the extent of such interest, including any such interest of Pringle, for whom he carried on the business. Had he rendered himself liable for the return to Cole of goods delivered by the latter for the purposes of manufacture, liability of that character would have constituted an interest of his in Cole's goods for which he would have been entitled to recover upon these policies. I have been unable to find any sufficient evidence to establish liability of that character; and, while something was said by Cole and Wray about the former contributing towards the premium, I can find no agreement binding on Wray rendering him liable to Cole to make good the loss of the latter's goods sustained through the fire. Cole may have relied on Wray's statement that he carried insurance sufficient to protect him, and it may be that both believed that there was such protection, but in what occurred between Wray and the company's representative, Jackson, there is nothing from which an inference can be drawn that the company undertook or understood or had any belief or knowledge that the policies should cover anything in excess of Wray's insurable interest personally and as representing Pringle. The nature of Cole's interest in the goods, or that he had any interest therein, was not communicated to the company or its representatives, nor indeed that any one but Wray and Pringle was interested either when the application was made or the policies issued.

There is nothing in the present case, as there was in *Davidson v. Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394, excluding the application of the statutory condition, here found in condition 6 (a), which declares that the company is not liable for the loss of property owned by any other person than the

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assured, unless the interest of the assured is stated in or upon the policy. I appreciate the importance of considering whether the policies are by their terms limited to Wray's interest (personally and as representing Pringle), and whether the contract is sufficiently broad to include the interest of others in the goods destroyed or damaged. The policies insured F. E. Wray in trust against direct loss or damage by fire or lightning to the goods as above particularly described. In the absence of a specific reference to goods of others than Wray or Pringle, for whom he held in trust, and having regard to the circumstances in which these contracts are made, I am of opinion that the protection was limited to the interest of Wray and of Pringle, for whom he held in trust.

In *Castellain v. Preston* (1883), 11 Q.B.D. 380, Bowen, L.J., said (p. 398) that "a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions: first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and, secondly, he must intend to insure the whole value at the time." That proposition is favourable to an assured in cases where the two conditions have been complied with. Unless statutory condition 6 (a) is to be disregarded—and I have already said that it is applicable here—and, for the reasons I have already indicated and on the facts as I have found them, I think the case is not within the conditions so laid down in the *Castellain* case, and that the interests covered by the policies are those of Wray, or Wray in trust, and the defendant Pringle.

The difficulties of this action were increased by the manner in which it was instituted and came down to trial, the defendant Pringle not having been added as a party until after delivery of the defence by the defendant company, and Wray not having been added as party plaintiff until the trial was in progress.

In Wray's proof of loss he apportioned the loss as between the defendant company and the other companies whose policies covered the same goods, and fixed the defendant company's portion of the loss on the property of "F. E. Wray in trust" at \$645.50, the amount which the defendant company afterwards paid into Court, and which Pringle accepted in extinction of his claim. This statement of Wray's, subject to and without prejudice to any rights he may have against the other companies, establishes, so far as he is concerned, the amount for which recourse can be had against the defendant company in respect

of damage or loss to the goods of Wray and Pringle. The defendant company in its pleadings admitted an indebtedness on the machinery, goods and chattels, the property of F. E. Wray in trust, to the amount of \$645.50, but alleged that at the time the action was commenced 60 days had not elapsed after the completion of the proofs of loss in respect of the property of F. E. Wray in trust, evidently having in mind statutory condition 22, that the loss shall be payable in 60 days after the completion of the proofs of loss, unless a shorter period is provided for by the contract of insurance. The most prominent statement on the very page of these contracts on which the statutory conditions are printed is, "Loss, if any, under this policy shall be due and payable within 5 days after receipt of proofs herein required." So far as they related to Wray's claim for himself and Pringle, the proofs were completed and delivered more than 5 days before the action was commenced, and I am not aware that they were otherwise objected to by the defendant company.

Cole, in my opinion, is not entitled as beneficiary suing under sec. 89, sub-sec. 2, of the Ontario Insurance Act, R.S.O. 1914, ch. 183, and has no status to sue in that character; and there was no sufficient assignment to him entitling him to sue upon the claim of Wray or Pringle. When Wray was added as a party plaintiff, the defendant company had already paid into Court the portion of the loss on the goods of Wray and Pringle which Wray in his proofs of loss apportioned to and claimed against the defendant company.

In any view of the case, I am unable to decide in the plaintiffs' favour, and the action will therefore be dismissed with costs to the defendant company against the plaintiff Cole, and against the plaintiff Wray from the time he was added as a party plaintiff. I make no order as to Pringle's costs.

The plaintiffs appealed from the judgment of KELLY, J.

November 30. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. A. E. Braden, for the appellants. Under the Insurance Act, the insurers are obliged to point out the conditions in the policy to the policy-holder. We must shew an insurable interest in the goods in order to succeed, and this we have done: *Davidson v. Waterloo Mutual Fire Insurance Co.*, 9 O.L.R. 394; *Keefer v. Phoenix Insurance Co.* (1900), 31 Can. S.C.R. 144. Wray could insure the goods in question for their full insurable value, if he had an insurable interest in them, however small: *Waters v. Monarch Fire and Life Assurance Co.* (1856), 5 E. &

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B. 870. Statutory condition 6 (a) of the Insurance Act applies only to the case where the person applying for the insurance has no interest at all in the goods.

R. S. Robertson, K.C., for the defendant company, responds. The fire must be the direct cause of the loss; it must not be a loss owing to some contract made by Pringle to insure some one else (e.g., Cole) against fire. Cole has no right of action at all; statutory condition 6 (a) is decisive. *Keefer v. Phoenix Insurance Co.*, *supra*, is distinguishable on the facts.

Braden, in reply.

December 16. MEREDITH, C.J.C.P.:—Beside the bailment of the goods in question, for the purpose of having them made into clothing for the owner, and the rights and obligations arising out of such a bailment; the bailee agreed to insure them for the owner's benefit and at his expense: and that was intended to be done in the policy of insurance upon which this action is brought.

The right of the bailee so to insure them cannot be questioned, and is not.

The defence to the action is that the policy does not cover them: and in support of that defence part of the sixth "statutory condition" is mainly relied upon. The part of that enactment, so relied upon, is in these words: "6. The company is not liable for the losses following, that is to say: (a) For the loss of property owned by any other person than the assured unless the interest of the assured is stated in or upon the policy;"

In the policy, the insurance is stated to be of "F. E. Wray in trust, against direct loss or damage by fire or lightning . . . on property as per form attached hereto;" and, in the form attached, the "description" contains these words, among others: "on stock in trade of every description, manufactured, unmanufactured and in process thereof, manufactured or dealt in by the assured, their own, held in trust or on consignment or sold but not delivered or removed"

The loss sustained was a direct loss by fire; nothing is claimed for except that which was the direct result of fire.

So that the only real question, as to liability, upon the policy, in respect of the goods owned by the plaintiff Cole, but in which, especially in their manufactured state, the insured has very substantial rights and interests, is, whether "the interest of the insured is stated in or on the policy."

And at the threshold of a threshing out of that question, it must be stated, and must always be borne in mind, that the de-

fendant company, through its agent who effected the insurance, knew that it was intended to cover goods which the insured did not own, but had to be manufactured by him, as he had the goods of the plaintiff Cole; and that the words used in the "description" are those of the company and were intended to cover such goods.

And why are they not sufficient? Their own, or not their own, but held in trust by them "but not delivered or removed," and "manufactured, unmanufactured, or in process thereof."

It may be said that held "in trust" means held in trust by Wray for the real owner of the business carried on in the name of F. E. Wray in trust; but, even if that be so, why may it not mean, and more plainly mean, in trust for the plaintiff Cole? A bailee is commonly, and not improperly, called a trustee for the person whose goods he has in bailment.

I find no difficulty in giving effect to the insurance which the parties intended to effect; nor in the plaintiff Cole maintaining this action. He has an assignment of the policy; but it is said that Wray had no power to make it; but why not? He had power to effect the insurance, and did effect it, for the plaintiff Cole's benefit. Not only was there power to assign it, but, if it were necessary, an assignment of it should be enforced in this action, in so far as it was made for the plaintiff Cole.

I would allow this appeal; and, if the parties cannot agree, out of Court, as to the amount the plaintiff Cole should recover upon the policy, would refer it to the proper local officer to ascertain and state such amount; and direct that judgment be entered for the plaintiff Cole in that amount, with costs of action, after the confirmation of the report. The plaintiff Cole should have his costs of this appeal forthwith after taxation; and he should have the costs of the action, if the parties agree out of Court upon the amount the plaintiff Cole should recover.

RIDDELL, J.:—One Wray was the proprietor of a business in London, the business name being Everybody's Overall Company; he made an assignment for the benefit of creditors, and the assignee sold the business, etc., to Pringle, in March, 1920. Pringle had advanced Wray \$1,650; he paid \$4,800 for the bankrupt stock, and engaged Wray to run the business for him for the purpose of winding it up and getting his money out of it—the arrangement being on the terms of a letter from Wray to Pringle in the following words:—

"I believe if the stock and plant of Everybody's Overall Company could be bought at 80 cents on the dollar or say \$4,800, a good profit could be made on the transaction. If you care to

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make the purchase, I will undertake, as trustee for you, to dispose of the goods already made up and make up the balance of material and dispose of it together with the plant when no longer required, and turn over to you the entire sum or sums as received from time to time."

Wray adopted the name of "F. E. Wray in trust" as the business name under which Pringle's business was carried on for him—so that "F. E. Wray in trust" was an *alias* for John Pringle.

In order to "make up the balance of material and dispose of it," it was necessary to obtain quantities of material from other tradesmen. Cole, in the same kind of business, the overall trade, under the name of the Canada Overall and Shirt Company, had more orders than he could fill from his own factory: and he entered into a contract, on the 17th June, 1920, with Wray (acting for Pringle) whereby Wray agreed to manufacture for the Canada Overall and Shirt Company materials which were to be furnished from time to time, and he was to be paid according to the terms set out in the contract.

Cole continued to supply Wray with material, cloth and trimmings, and found the amount running up; he asked Wray about the insurance, and was assured that there was ample insurance. But Wray kept asking for more and more goods; Cole said that there was not enough insurance, and Wray agreed to put on another policy for him; afterwards he said he had done so, and assured Cole that his goods were fully covered. A fire took place in September; Wray assigned to Cole his two policies, one in the Gore and the other in the Merchants—Cole brought this action against the Merchants company; Mr. Justice Kelly, the trial Judge, dismissed the action on statutory condition 6 (a); and Cole now appeals. One, and perhaps the chief, objection of the defendant company is that Cole was not insured at all, nor were his goods covered by the policy.

The policy insures "F. E. Wray in trust against direct loss or damage by fire . . . machines and machinery of every description . . . stock in trade of every description, manufactured, unmanufactured and in process thereof, manufactured or dealt in by the assured, their own, held in trust or on consignment or sold but not delivered or removed, all while contained in the three-storey . . . building . . ." It is contended that the goods of Cole were not "held in trust" by "F. E. Wray in trust," i.e., Pringle. I cannot agree in this contention. The word "trust" has no technical meaning. "Goods held in trust" is a well-known expression in insurance matters, and means "goods held by the insured for which he is responsible to others"—and

insurance in this form has always been considered to insure, first, the bailee insuring to the extent of his liens or advances, etc. (if any); and, second, the owner of the goods. See *California Insurance Co. v. Union Compress Co.* (1889), 133 U.S. (Supreme Court of the United States) 387, which carries the proposition farther and makes such a policy enure to the benefit not only of the actual owner of the goods but also of all who have an insurable interest in them, because they are to that extent owners (p. 409).

In the present case the insurance was taken out under an agreement between Wray and Cole; and, so far as Cole's interest in the goods goes, was in effect taken out by him (p. 409).

Under the circumstances of this case, "F. E. Wray in trust" was entitled to take out insurance in that name on goods of Cole held by "F. E. Wray in trust," and, unless the statute interferes, can recover the whole amount up to the value of the goods, "holding the excess over its own interest in them for the benefit of those who have entrusted the goods to it" (p. 409).

The statutory condition 6 (a) is found by my learned brother Kelly to be a fatal stumbling block in the way of the plaintiffs.

It reads as follows:—

"6. The company is not liable for the losses following, that is to say:

(a) For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy."

This statutory condition is not new—it was in the original Act of 1876, 39 Vict. ch. 24, as 10(a), and has not been changed. It was in existence when *Keefer v. Phœnix Insurance Co.*, 31 Can. S.C.R. 144, was decided. In that case Keefer, who had been the owner of buildings, agreed to sell to Cloy for \$2,000, agreeing to keep them insured for \$2,000 until the purchase-price should be paid. Keefer insured the buildings in his own name, and when Cloy had paid all but \$700 a fire occurred. Cloy assigned to the Quebec Bank, and Keefer and the bank brought an action on the policy. Keefer had not disclosed the fact of his having made an agreement for sale, nor had the insurance company any knowledge of the fact until the day before the fire. Mr. Justice Ferguson held (1898), 29 O.R. 394, that Keefer could recover the full amount of the loss, the recovery "over and above the amount of his own loss being a recovery as trustee for the purchaser" (p. 399). The Court of Appeal reversed this decision, holding that the policy covered only Keefer's own interest ((1899), 26 A.R. 277)—the Chief Justice saying (p. 278):—

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"It is clear that a person having a limited interest in property may insure, nevertheless, on the total value of the subject-matter of the insurance, and that he may recover the whole value, subject to this, that the form of the policy must be such as to enable him to recover the total value, and that it must have been the intention at the time, both of himself and the insurers, to insure the whole value."

Mr. Justice Osler (p. 282) quotes from *Castellain v. Preston*, 11 Q.B.D. 380, as follows:—

"It is well known, of course, that a person with a limited interest may insure and recover the whole value of the thing insured, but then his policy must be apt for the purpose, and he must have intended so to insure."

The learned Judge adds (p. 282):—

"To the extent of what he recovers beyond the amount of his own interest, where the insurance is not so limited, he is trustee for others whose interests were intended to be covered."

There was no difference of opinion in the Court as to the law that a person having an interest could insure for and obtain the full amount of the loss, but the majority of the Court considered that the form of the policy was not apt to cover the full loss.

This was reversed in the Supreme Court of Canada, 31 Can. S.C.R. 144, where it was held that the fact that Keefer was not the sole owner need not be stated in the policy or disclosed to the insurer; and that the form of the policy was sufficient. The two conditions mentioned by Bowen, L.J., in *Castellain v. Preston*, 11 Q.B.D. 380 at 398, were accepted by the majority of the Court, "first of all, the form of his policy must be such as to enable him to recover the total value . . .; and, secondly, he must intend to insure the whole value at the time" (31 Can. S.C.R. at p. 150).

The policy sued on in that case was only to "indemnify and make good to the assured, his heirs or assigns, all direct loss or damage not exceeding in amount the sum or sums as above specified, nor the interests of the assured in the property." See per Osler, J.A., 26 A.R. at p. 283; Supreme Court Cases in Library, vol. 194 (1899), p. 12; and it was these words which caused the trouble and influenced the Court of Appeal in the decision. Had the wording of the policy been as in the present case, the decision would no doubt have been different.

In any event, the principle laid down in the Court of Appeal, that a person having a limited interest may insure for the full value if the policy is in apt form, cannot be gainsaid. That

Pringle, the assured, had an interest in the goods is plain; he was "trustee," responsible for them to Cole, and had undertaken to keep them insured.

Whatever may be the meaning of statutory condition 6(a), it does not cover the present case.

The assignment to Cole has been attacked: it is said to have been repudiated by Pringle. What is said does not in my mind amount to a repudiation but rather a grumble. But, in any event, making Pringle a party defendant, the plaintiff is *rectus in curiâ*.

I would allow the appeal.

We said at the hearing that we should not consider the question of quantum—if the parties cannot agree, there must be a reference.

LATCHFORD, J., agreed that the appeal should be allowed.

MIDDLETON, J., agreed in the result and in the reasons given by RIDDELL, J.

Appeal allowed with costs.

[APPELLATE DIVISION.]

RE TORONTO RAILWAY CO. AND CITY OF TORONTO.

Arbitration and Award—Case Stated by Arbitrators under sec. 29 of the Arbitration Act—Forum for Hearing—Judicature Act, sec. 12.

The proper forum for the hearing of a case stated by arbitrators pursuant to sec. 29 of the Arbitration Act, R.S.O. 1914, ch. 65, is a Divisional Court of the Appellate Division: sec. 12 of the Judicature Act, R.S.O. 1914, ch. 56.

Re Geddes and Cochrane (1901), 2 O.L.R. 145, approved and followed. *Re McConkey Arbitration* (1918), 42 O.L.R. 380, overruled.

CASE stated by arbitrators appointed under the Ontario statutes 55 Vict. ch. 99 and 11 Geo. V. ch. 126, sec. 11, to determine the amount to be paid by the city corporation to the railway company for plant, etc., taken over by the city corporation. The opinion of the Court was asked upon a question arising in the course of the arbitration proceedings, viz., whether the ruling of the arbitrators confining the production for inspection of the books of the Toronto Railway Company, shewing details of the cost of the property taken over, to the books and

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records of the company since the 1st January, 1913, was right. The case was stated pursuant to sec. 29 of the Arbitration Act, R.S.O. 1914, ch. 65, which provides that "an arbitrator may at any stage of the proceedings and shall, if so directed by the Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

Section 12 of the Judicature Act, R.S.O. 1914, ch. 56, provides as follows:—

12.—(1) The Appellate Division shall exercise that part of the jurisdiction vested in the Supreme Court, which, on the 31st day of December, 1912, was vested in the Court of Appeal and in the Divisional Courts of the High Court, and such jurisdiction shall be exercised by a Divisional Court of the Appellate Division, and in the name of the Supreme Court.

(2) Except as provided by the next preceding subsection, all the jurisdiction vested in the Supreme Court shall be exercised by the High Court Division in the name of the Supreme Court.

Section 67 (1) of the Judicature Act in force in 1912, R.S.O. 1897, ch. 51, provided as follows:—

67.—(1) Subject to Rules of Court, the following proceedings and matters shall be heard and determined before a Divisional Court of the High Court:

(a) Proceedings directed by any statute to be taken before the Court in which the decision of the Court is final.

Section 43 (1) of the Judicature Act, R.S.O. 1914, ch. 56, provides as follows:—

43.—(1) Every action and proceeding in the High Court Division, and all business arising out of it, except as herein otherwise expressly provided, shall be heard, determined and disposed of before a Judge, and where he sits in Court he shall constitute the Court.

The case was set down for hearing by a Divisional Court of the Appellate Division.

November 28. The case came on for hearing before MEREDITH, C.J.C.P., LATCHFORD, MIDDLETON, and LENNOX, JJ.

W. N. Tilley, K.C., and C. M. Colquhoun, for the city corporation.

N. W. Rowell, K.C., and Frank McCarthy, for the railway company, raised a preliminary objection to the hearing of the case, viz., that it should have come before a single Judge of the High Court Division, citing *Re McConkey Arbitration* (1918), 42 O.L.R. 380, 43 D.L.R. 732, where it was held by Middleton.

J., that a case stated by arbitrators, under sec. 29 of the Arbitration Act, for the determination of the Court, is now to be heard by a Judge in the Weekly Court: Judicature Act, R.S.O. 1914, ch. 56, sec. 43; and *Re Geddes and Cochrane* (1901), 2 O.L.R. 145, was distinguished. They referred also to Halsbury's Laws of England, vol. 1, p. 464, para. 976; *Collins v. Vestry of Paddington* (1880), 5 Q.B.D. 368; Mackenzie and Chitty's Yearly Practice of the Supreme Court (Red Book), 1917, vol. 2, p. 1650.

Tilley, K.C., and *Colquhoun*, answering the preliminary objection, contended that *Re Geddes and Cochrane* was still good law. That was a decision of a Divisional Court of the High Court of Justice in a case stated by arbitrators pursuant to sec. 41 of the Arbitration Act then in force, which was in the same words as sec. 29 of the present Arbitration Act. Under the present Act, as under the former, the opinion or decision of the Court upon the stated case is final—it is the end of the proceeding and cannot be reviewed by an appellate Court. The position is still the same under sec. 12 of the present Judicature Act; the opinion or decision of the Court being final in the sense that there is no appeal from it; the proper tribunal, under sec. 12 of the Judicature Act, is a Divisional Court of the Appellate Division. The proceeding in *In re Small and St. Lawrence Foundry Co.* (1896), 23 A.R. 543, was not upon a case stated by arbitrators.

Rowell, K.C., in reply, referred again to the *Collins* case and to *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547, 548.

[MIDDLETON, J., during the argument, said that, when deciding the *McConkey* case, he had not been referred to and had not considered sec. 12 of the present Judicature Act, which made it plain that this Court was the proper tribunal.]

The question stated by the arbitrators was also argued by counsel.

December 16. The Court gave judgment answering in the negative the question propounded by the arbitrators. Reasons were given in writing by MEREDITH, C.J.C.P., and LENNOX, J.

The Chief Justice and LATCHFORD and MIDDLETON, JJ., were of opinion that the proper forum for the hearing of the case was a Divisional Court of the Appellate Division.

MEREDITH, C.J.C.P., dealing with the preliminary objection, said:—

We should, I think, follow the ruling in the case of *Re Geddes and Cochrane*, 2 O.L.R. 145, on the question whether

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this case should be heard here or in the High Court Division: many matters of much less importance come to this Division: and it is not well to upset a practice which has been followed since that case was decided and has become a settled one: indeed such applications as this are very few in number; and they involve—as in this case—matters of much moment always; and they generally—as in this case also—come from arbitrators, some of whom are prominent lawyers; so that I cannot but think it more fitting, helpful, and convenient that they should be heard by this Court rather than by a “single Judge” in the High Court Division, even if there were a right of appeal from his decision. Present-day legislation and practice make it plain that everything of appellate character should come to the Appellate Division.

LENNOX, J., referring to the preliminary objection, said:—

A majority of the Court being of opinion that we have jurisdiction, I have not found it necessary to consider the question; and, indeed, if the most careful research inclined me to an opposite conclusion, I could have no great confidence in the result, in the face of the conclusion reached by my more experienced and learned brothers.

Objection overruled.

✓

 [MIDDLETON, J.]

1921.
 Dec. 17. ✓

PEARCY v. FOSTER.

Mechanics' Liens—Action to Enforce—Interlocutory Rulings in Course of Trial—Right of Appeal from—Mechanics and Wage-Earners Lien Act, sec. 40.

The Mechanics and Wage-Earners Lien Act, sec. 40 (2), provides for an appeal, in a proceeding to enforce a lien under that Act, from the judgment of the Master or Referee to a Divisional Court of the Appellate Division, where the amount involved is in excess of that mentioned in sec. 40 (1); but no other right of appeal is given or contemplated. Although the Consolidated Rules are made applicable where there is no other provision, that is not sufficient to import into mechanic's lien proceedings the same right of interlocutory appeal as there may be in ordinary actions.

AN appeal by the defendant Foster, the owner, from a certificate of the Assistant Master in Ordinary of certain rulings and proceedings made and taken by him in the course of the trial of an action to enforce a mechanic's lien and of the claims

of other lienholders, under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140.

1921.
PEARCY
v.
FOSTER.

December 8. The appeal came on for hearing before MIDDLETON, J., in the Weekly Court, Toronto.

R. S. Robertson, K.C., for the appellant.

C. B. Henderson, for the plaintiff.

William Proudfoot jun., for certain claimants.

John J. Grover, for another lienholder.

A preliminary objection was taken that there was no right of appeal.

December 17. MIDDLETON, J.:—The trial has been opened before the Assistant Master, and he has not yet concluded the hearing. Objection is taken to his mode of proceeding.

There are many liens filed against the property in question, and what is complained of is that the Master is proceeding to hear all evidence tendered by all lienholders without requiring pleadings on the part of the different claimants other than the plaintiff, in whose action the trial is actually taking place.

The Master has adjourned the trial to allow notice to be given to the present owners of the equity of redemption, who were apparently not notified in the first place, and has given certain directions as to the filing of certain statements in order to elucidate the issues which he has to try.

It is also argued that he is about to determine an issue not properly before him.

I think the preliminary objection is well taken. The statute (the Mechanics and Wage-Earners Lien Act, sec. 40 (2)) provides for an appeal to a Divisional Court of the Appellate Division (if the amount involved is in excess of that mentioned in sec. 40 (1)); no other right of appeal is contemplated. It is true that the Consolidated Rules are made applicable where there is no other provision, but I do not think that this is sufficient to import into mechanic's lien proceedings the same right of interlocutory appeal as there may be in ordinary actions.

If a certificate can be obtained as to the Master's ruling at an interlocutory stage, and an appeal can be had from that to a single Judge, a curious state of affairs will arise, for the same question may go directly to a Divisional Court if the parties await the final determination of the matter before the Master.

The appeal is therefore quashed. I think it is inexpedient to make any order as to costs.



1921.

[IN CHAMBERS.]

Dec. 19.

RE TORONTO CANADIAN BUILDING CO.

Land Titles Act—Transfer of Charge—Provision for Re-transfer—Requirements of Land Titles Act Rule 28 (2).

A transfer of a charge under the Land Titles Act which is not absolute should not be recorded unless the terms of redemption are therein named or therein stated; and the requirements of Rule 28 (2) of the Rules made under the Land Titles Act are not satisfied by a reference in the transfer to an unregistered agreement made between the transferor and transferee.

The Rule does not restrict the property-right of the owner of a charge: there is nothing to limit the generality of the terms used so long as the condition for re-transfer is clearly stated in the transfer itself.

A question which arose in the Land Titles Office, in which counsel for the applicants was not able to agree with the views of the Master, was informally argued before MIDDLETON, J., under the provisions of the Land Titles Act relating to appeals from rulings of the Master.

A. J. Thomson, for the applicants.

The Master of Titles appeared in person.

December 19. MIDDLETON, J.:—The question involved is of practical importance. Rule 28 (2) of the Rules made under the Land Titles Act provides as follows:—

“A transfer of a charge may contain an agreement that, upon the payment of a sum of money therein named or upon the performance of any condition therein stated, the charge shall be re-transferred to the transferor.”

The document tendered for registration was a transfer of a charge containing this clause: “It is agreed by and between the above named transferor and transferee that the above described charge shall be held by the transferee as collateral security for the balance owing by the transferor to the transferee under a certain agreement dated the 1st March, 1913.”

The learned Master objects to the registration of this transfer of charge because it purports to embody in it the terms of an unregistered agreement.

Upon the argument before me, the discussion took a somewhat wider scope.

After a conference with my Lord the Chief Justice of the Province, he agrees with me in the conclusion arrived at. I think that the learned Master is right in emphasising the words “therein named” and “therein stated” in the Rule in question, and that a transfer which is not absolute should not be recorded

unless the terms of redemption are therein stated or therein named; and I do not think that this requirement of the Rule is satisfied by a reference to an unregistered agreement between the same parties.

I agree with Mr. Thomson in the view that he puts forward, that it is not the intention that the Rule quoted shall restrict the property-right of the owner of a charge: he may transfer it subject to an agreement for re-transfer upon payment of a definite sum of money therein named, or he may transfer it subject to an agreement for re-transfer "upon the performance of any condition therein stated;" there is nothing to limit the generality of the terms used so long as the condition for re-transfer is clearly stated in the transfer itself.

This, I think, covers everything that was argued.

Middleton, J.
1921.

RE TORONTO
CANADIAN
BUILDING
Co.

[IN CHAMBERS.]

REX v. DURNO.

1921.

Dec. 20.

Ontario Temperance Act—Magistrate's Conviction—Motion to Quash—Adequate Remedy by Appeal—Ontario Temperance Amendment Act, 1921, 11 Geo. V. ch. 73, sec. 6—Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10 (3)—Disputed Jurisdiction of Magistrate—Finding in Favour of Jurisdiction—Review upon Appeal.

By sec. 6 of the Ontario Temperance Amendment Act of 1921, 11 Geo. V. ch. 73, an appeal from a magistrate's conviction under the principal Act is provided for; and sec. 10 (3) of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, provides that a conviction shall not be removed into the Supreme Court by certiorari or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place would not afford an adequate remedy:—

Held, upon a motion to quash a conviction made by a Police Magistrate under the Ontario Temperance Act, that the right of appeal given by the Act of 1921 afforded an adequate remedy, and the motion could not be entertained.

Rex v. Denny (1921), ante 121, followed.

The convicting magistrate's jurisdiction was disputed, upon the ground that the Police Magistrates' Extended Jurisdiction Act, 1921, 11 Geo. V. ch. 42, had in effect cancelled his commission; but the magistrate found that he had jurisdiction:—

Held, that the finding of jurisdiction could be reviewed upon an appeal from the conviction.

Simpson v. Crowle, [1921] 3 K.B. 243, followed.

MOTION for an order quashing a conviction of the defendant made by Walter J. Barr, a Police Magistrate in and for the Town of Burlington, dated the 14th October, 1921, for an offence against the Ontario Temperance Act.

1921.
—
REX
v.
DURNO.

December 19. The motion was heard by MASTEN, J., in Chambers.

G. W. Morley, for the defendant.

F. P. Brennan, for the magistrate.

December 20. MASTEN, J.:—The applicant was convicted of a breach of the Ontario Temperance Act, “for that he, the said Ervine Durno, on the 15th day of October, A.D. 1921, at the town of Burlington, in the said county, unlawfully did have in his possession a quantity of liquor contrary to the Ontario Temperance Act.”

A preliminary objection falls to be determined in this case, viz., that *certiorari* does not lie, because the conviction is appealable under the provisions of the Ontario Temperance Amendment Act of 1921, 11 Geo. V. ch. 73, sec. 6, which provides for an appeal from a conviction under the Act to the Judge of the County or District Court.

In support of the objection is cited the case of *Rex v. Denny*, decided by my brother Middleton on the 14th October last, *anté* 121. I have been furnished with the judgment in that case, and it is founded upon the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 10, subsec. 3, which provides:—

“No such order or conviction shall be removed into the Supreme Court by writ of *certiorari* or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy.”

In the present case it is contended that the above section does not apply where the invalidity of the conviction (if it is invalid) results from an alleged want of jurisdiction in the magistrate who convicts. It is said that the effect of sec. 5 of the Police Magistrates Extended Jurisdiction Act, 1921, 11 Geo. V. ch. 42, was, in the circumstances here shewn to exist, such as to rescind and cancel the commission as a police magistrate and any right or jurisdiction on the part of Walter J. Barr, the convicting police magistrate, to exercise any of his functions except those set forth in subsec. 2 of sec. 5 of that Act. The conviction in question, it is alleged, does not come within the exceptions of subsec. 2, and therefore it is contended by the applicant that the magistrate acted without jurisdiction. The magistrate affirmed his jurisdiction and recorded a conviction.

The question is whether an appeal lies from such an order, and, if appealed against, would the appeal afford an adequate remedy?

The applicant argues that if the magistrate had no jurisdic-

tion no cause existed, there being no court, and where no cause existed no appeal can lie. The argument seems both plausible and logical, but, by well-established practice, common sense prevails, and an appeal lies on a question of jurisdiction in the same manner as on any other question.

The latest illustration of this principle that I have found is afforded by the case of *Simpson v. Crowle*, [1921] 3 K.B. 243. In that case the County Court Judge erroneously held that he had jurisdiction, considered the merits, and dismissed the action. An appeal was entertained by a Divisional Court, and the County Court Judge was declared to have no jurisdiction, his findings on the merits were set aside, and in lieu thereof the judgment was directed to provide as follows: "The Judge, being of opinion that he has no jurisdiction to try the action, doth dismiss it." The appeal was entertained notwithstanding the fact that in the County Court the parties proceeded to trial without the question of jurisdiction being raised.

In our own Courts the cases of *Re Cosmopolitan Life Association* (1893), 15 P.R. 185, and *Sherk v. Evans* (1895), 22 A.R. 242, may be referred to.

I am therefore of opinion that an appeal lies, and further that the appeal affords an adequate remedy, and this brings the case within the decision of my brother Middleton in the case of *Rex v. Denny*.

The result is that the motion must be refused with costs. The other questions which were argued before me on the hearing of the motion may hereafter arise in some other forum, and I refrain from discussing them.

[APPELLATE DIVISION.]

BROWN V. DOMINION EXPRESS CO.

Carriers—Express Company—Goods Stolen from Warehouse at Point of Destination—Liability of Company as Bailee—"Owner's Risk"—Absence of Wilful Neglect or Misconduct.

1921.

Intoxicating liquors, purchased by the plaintiff in the Province of Quebec, and carried in bottles and cases by the defendants for him to a place in Ontario, were stolen while in the defendants' warehouse at the point of destination:—

Held, upon the evidence, that the goods were, while in the defendants' warehouse, "at owner's risk."

The defendants did not hold themselves out as being warehousemen and made no warehouse charges:—

Held, that, holding the goods "at owner's risk," they could not be found liable for the loss unless they were guilty of wilful neglect or misconduct.

Masten, J.

1921.

REX
v.

DURNO.

May 2.
Dec. 27.

1921. *Dixon v. Richelieu Navigation Co.* (1888-90), 15 A.R. 647, 18 Can. S.C.R. 704, followed.
- BROWN *Mitchell v. Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 Q.B. 256, distinguished
- v. *And held*, that there was no evidence to sustain a finding of wilful
- DOMINION neglect or misconduct, although the warehouse was not well pro-
- EXPRESS CO. tected against burglars.
- Judgment of LENNOX, J., reversed.

ACTION to recover \$1,480, the value of 105 cases of bottles of intoxicating liquors purchased by the plaintiff at Walkerville and shipped to him at Kingsville. While in the possession of the defendants, the carriers, in their warehouse at Kingsville, the 105 cases were stolen, and the plaintiff alleged that the defendants were liable to him for the loss.

The action was tried by LENNOX, J., without a jury, at Sandwich.

J. H. Rodd, for the plaintiff.

John D. Spence, for the defendants.

May 2. LENNOX, J.:—Of four actions tried at the same Court at Sandwich concerning the carriage and loss of intoxicating liquor, this is the only one in which I can say that there is no ground upon which dishonesty, or an intention to evade the law, could be imputed. The plaintiff is a man of good financial standing, carrying on a lucrative business, and the liquor in question was not purchased with the intention of reselling it.

The plaintiff claims to recover \$1,480. The first shipment was of 5 cases declared to be of the value of \$75. This was received by the company on the 5th February, 1920. The other shipment contained 100 cases, valued at \$1,400, and was received on the 15th March, 1920. Both were taken on at Walkerville, carried by the company to Kingsville—arriving a day later in each case—stored in the company's warehouse at that point; and the whole was stolen from the company's warehouse on the night of the 23rd March, 1920.

The defendant company rely upon the plaintiff's delay in taking delivery, and particularly upon a special contract, in the form of a receipt given therefor to the shippers, by which the plaintiff is bound, and some of the terms and conditions of which were as follows:—

“5 (b) For loss or damage occurring after 48 hours (exclusive of legal holidays) after notice of the arrival of the shipment at the destination or point of delivery had been mailed to the address of the consignee.

“(c) The company shall not be liable for any loss caused by the default of the shipper or owner.

“(d) For any loss or damage caused by delay or injury to or loss or destruction of the shipments or any part thereof from conditions beyond the control of the company, unless such loss or damage is caused by the negligence of the railway company upon whose trains or property the shipment is at the time such loss or damage occurred.”

Clause (a) refers to “differences in weight or quantity by shrinking, leakages, etc. :” to clause (b), this omitted condition, referring to (a) and (b), must be added, namely: “unless in either case such loss or damage was caused by the negligence of the company.” This is a very important qualification of condition (b) set up by the defence.

The question for decision is: of two innocent parties which should bear the loss?

The defendants are common carriers, and, when the transit is at an end, their liability is to be determined by the law touching warehousemen or bailees. The company not having given any written notice, there is room for debate as to whether their liability as carriers did not continue, that is, as insurers of the goods carried at common law, and still insurers, except in so far as the common law liability is modified by statute or the orders of the Railway Board; but I do not find it necessary to weigh this point carefully. Warehousing, more or less, is incidental to the defendants’ business as common carriers, it is an inseparable factor of their calling, and the law attaches obligations, although not as burdensome, in some respects, as during transportation.

The building in which the company housed the plaintiff’s goods is a stone structure, having the appearance, no doubt, to their customers and persons not having to examine and keep it in repair, of strength and security. The company kept it locked up at all times when they were not taking in or delivering goods, I presume, and their agent notified the plaintiff that his goods would be under lock and key, although, as to the first shipment, and I am not sure as to the other, the agent added, “They will be at your risk.” The direct cause of the theft was that, although the door used for ingress and egress was locked, there was another door, in the rear of the building, I think, the fastening of which was by hook and staple, and this had been so adjusted originally or had been allowed to fall into such a condition of nonrepair that by jerking upon the door on the outside the hook would spring out of the staple, and access could be gained in this way; and admittedly this is the way the thieves got in.

It was faintly suggested that the company are in the position of gratuitous bailees; that they are not in the habit of

Lennox, J.

1921.

BROWN

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charging for storage and have no legal right to make a charge. The point was not developed, and I shall refer to it again later.

A warehouseman is one who, as his business or as part of his business, has the custody and care of another man's goods. Unless there is some law or regulation preventing him, he has, in the absence of a special agreement or regulation or rule, an implied right to demand and obtain reasonable compensation for space and care. He is not an insurer, but he is bound to take all reasonable care of the goods, and is liable for loss and injury occasioned by his negligence. A railway company ceases to be a common carrier and becomes a warehouseman when the transit is at an end, and it is the same as to other common carriers if the business they are engaged in involves the housing and care of the goods they profess to carry. I can find no ground for specialising in the case of this company. Their business is subject to the provisions of the Railway Act and the orders of the Board of Railway Commissioners for Canada. Amongst other things, the Board may determine "(a) the extent to which the liability of the company may be impaired, restricted or limited; and (b) prescribe the terms and conditions under which goods may be collected, received, *cared for* or handled," etc.: The Railway Act, R.S.C. 1906, ch. 37, sec. 353, subsec. 3.*

The contracts in this case are stated to be in pursuance of orders and approvals of the Board of Railway Commissioners, but it is not shewn that the common law liability of the company as warehousemen has been "impaired or restricted" by any schedule, classification, or order of the Board in the way suggested, or that they are not entitled to collect tolls for goods remaining in their warehouses if and when they comply with the orders of the Board by notice in writing. If it is a fact that they are prevented from collecting warehouse charges, the order should have been filed, and it would then, no doubt, appear that the right was surrendered in consideration of some other advantage, and if so there would be indirect compensation.

Chapman v. Great Western R.W. Co. (1880), 5 Q.B.D. 278, is an illustration of absence of negligence upon the part of the company and non-liability.

As to one of the consignments sued for in this action there was a slight error in the name of the consignee, but it occasioned no difficulty. The company's agent knew for whom it was intended, so informed the law officers, and, in all that he did or says he did, treated the plaintiff as owner, as he in fact was.

I am of opinion that the plaintiff is entitled to recover; but I think it right that I should add that I have not come to this

*See the Railway Act, 1919, 9 & 10 Geo. V. ch. 68, sec. 365 (2).

conclusion without a good deal of hesitation. There is no "poor man" in this case on either side, and so my judgment is not liable to be warped by unconscious sympathy. There is no getting away from the fact that Mr. Brown had made use of the company's premises for the first shipment, and proposed to use them, for some little time further at least, for the second, for his own convenience, because his house was vacant and supposedly unsafe. It is argued by counsel for the defence, upon the authority of *Pleet v. Canadian Northern Quebec R.W. Co.* (1921), 48 O.L.R. 351, and in appeal 50 O.L.R. 223, that the plaintiff was guilty of "gross negligence" and so not entitled to recover. However vigilant the plaintiff might have been, he must rely upon the contract of the company, express or implied, to care for the goods; and, assuming without deciding that their duty as carriers was ended, the relevant question is the negligence of the company. If there is a difference in the grades of negligence, they were guilty of the grossest kind of "gross negligence" in leaving the warehouse in the condition described. Jewels or rubies or diamonds were not as liable to be stolen in the county of Essex in March, 1920, as the plaintiff's 105 cases of "necessaries," as the company's agent must have known, and he must have known that the existence of this precious store was sure to be noised abroad, for the officers of the law had visited him; and to talk of the things they have done, the things they are doing, and the things they are going to do, is of the essence and being of "the moral uplifters" everywhere. To turn the key in the front door was not enough—a burglar never enters by the front door—it became the duty of the company, constantly handling this coveted commodity, to test the safety appliances of their warehouses; it became the immediate and imperative duty of their agent, in the circumstances I have referred to, to be alert and vigilant.

I think the principle of *Mitchell v. Lancashire and Yorkshire R.W. Co.* (1875), L.R. 10 Q.B. 256, applies to the decision of this action. It is true that in that case the company described themselves as warehousemen and referred to warehouse charges. They requested the plaintiff to remove the flax at once, and part of it remained for over two months. They tried to protect it, but had no adequate means. Blackburn, J., said (p. 260): "After this notice, and the consignee does not fetch the goods away, and becomes *in morâ*, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee. . . . I think, . . . the railway company in holding these goods could have charged warehouse rent, and that being so, I think there can be no doubt that

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prima facie there was a liability in them as bailees for reward. The liability of an ordinary bailee is to take ordinary and reasonable care. And if the defendants in this case are under that liability, there is ample evidence that they did not do that." The learned Judge held that "at owner's sole risk" did not relieve them. I have said all I need say as to the right of the company to charge for storage in this case.

The declared value of the goods was \$1,475, not \$1,480. The plaintiff claims interest by way of damages. I do not think I should allow it—he is not damaged by the delay, the money is worth more *now* than the unconsumed residue of the liquor would be if he had got it a year ago. The company are entitled to the express charges; these will be deducted, and there will be judgment for the balance with costs.

The defendants appealed from the judgment of LENNOX, J.

September 27. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

John D. Spence, for the appellants, argued, first, that a reasonable time for delivery had not expired; secondly, that, if the appellants were liable at all, they were liable only as warehousemen and not as carriers; and, thirdly, that there had been an arrangement between the plaintiff and the appellants at least in regard to the 5 cases, and by inference in regard to the 100 cases, whereby the plaintiff was to leave the goods in the custody of the appellants "at his own risk." On the question of the meaning of "owner's risk," reference was made to *Brown & Theobald's Law of Railway Companies*, 4th ed., p. 318, and cases there cited; *McCombs v. North Carolina R.R. Co.* (1872), 67 N. Car. 193; *Dixon v. Richelieu Navigation Co.* (1888-90), 15 A.R. 647, 18 Can. S.C.R. 704. It was also contended that the defendants were merely gratuitous bailees, and so only liable for gross negligence, and there had been no such negligence shewn: *Halsbury's Laws of England*, vol. 1, p. 532; *Newman v. Bourne and Hollingsworth* (1915), 31 Times L.R. 209. Counsel also disputed the applicability of *Mitchell v. Lancashire and Yorkshire R.W. Co.*, L.R. 10 Q.B. 256, upon which the learned trial Judge had founded his judgment, to the facts of the present case.

J. H. Rodd, K.C., for the plaintiff, respondent, said, as to the 5 cases, that, unless he could prove negligence, he must fail on account of the finding about "owner's risk" against him. But as to the 100 cases he was not so handicapped. The finding as to them was against the appellants. So far as the 100 cases were

concerned, the appellants were liable as carriers, as they were not even yet ready to deliver: Halsbury's Laws of England, vol. 4, pp. 12 and 13. The finding of the learned trial Judge as to negligence of the appellants was correct. The respondent had been lulled into security by the appellants' agent telling him that the goods were under lock and key. The room where the appellants had stored the goods was not such a safe place that a reasonable man would put his own goods in it for security.

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Spence, in reply.

December 27. The judgment of the Court was read by MACLAREN, J.A.:—This is an appeal by the defendants from a judgment of Lennox, J., of the 2nd May, 1921, condemning the defendants to pay to the plaintiff the sum of \$1,440.58, the value (less express charges) of two consignments of liquor shipped by Hiram Walker & Sons at Walkerville to the plaintiff at the village of Kingsville in the same county.

The first consignment, of 5 cases, was shipped on the 5th February, 1920, and was valued at \$75; the second, of 100 cases, was shipped on the 15th March, and valued at \$1,400. Each consignment reached Kingsville the day after shipment.

The facts relating to the first shipment are not really in dispute and depend upon a question of law, but the parties differ widely as to the circumstances relating to the second shipment.

The plaintiff is a fisherman, carrying on business at Kingsville, and has a residence there in which he spends the summer months or the fishing season, and has also a winter residence in Windsor.

When the first consignment arrived at Kingsville on the 6th February, the express agent, Hall, says that he endeavoured to make delivery, and called up the plaintiff's house but could get no response. He then placed the 5 cases in a room in the station building, called the old bonded room, which was kept locked and which was considered a place of safety. A few days later he met the plaintiff in the street and informed him of the shipment being there. The plaintiff said he would not be in Kingsville for a while, and asked if he could not leave it there for a few days. Hall replied that it was under lock and key; but it was there at his own risk. The plaintiff admits that Hall told him that it would be there at his own risk if he left it, and he acquiesced.

The second shipment, of 100 cases, was made on the 15th March, 1920, and arrived at Kingsville on the 16th. The agent says that he saw one Westcott, a special friend of the plaintiff's, that day, and asked him where the plaintiff was, and was told

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that he was in Windsor. He told Westcott that a consignment had come for Brown and asked Westcott to notify him.

The agent says that he was called up the next forenoon by the plaintiff by long distance telephone from Windsor and asked about the consignment. The plaintiff said he would be down in a day or two and look after it, and he asked if it would be all right to leave it there. It had been placed in the old bonded room, where the 5 cases were, on the evening of the day on which it arrived. The plaintiff asserts that his conversation with Hall was not on the 17th, as alleged, but was on the 20th, and he denies that he was then told that it would be at his risk.

On Wednesday morning of the following week, the 24th March, it was discovered that the plaintiff's 105 cases, with 3 cases for another person, had been stolen during the night.

The usual entrance to the bonded room was from the main room of the station and the express office, through a slatted door, which was kept locked. There was also a heavy sliding door in the rear wall of the bonded room, which was not used, not having been opened for the last 2 or 3 years. It was fastened by two hooks and staples, an upper and a lower one, made of iron, of about $\frac{3}{8}$ of an inch in diameter. The hooks were found to be considerably straightened out, so that, when replaced in the staples, they could by great pressure be sprung out. It was manifest that the burglars had reached the liquor in this way. They had closed the sliding door after them, leaving the hooks hanging down loose.

The learned trial Judge said that he had not come to the conclusion to hold the defendants liable without a good deal of hesitation. He did so, he said, on the principle laid down in the case of *Mitchell v. Lancashire and Yorkshire R. W. Co.*, L.R. 10 Q.B. 256. With great respect, I am unable to see the analogy between the two cases. There the railway company gave the consignees notice to remove the goods "as soon as possible, as they remain here to your order, and are now held by the company, not as carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges, in addition to the charges now advised." See the remarks of Blackburn, J., on p. 262, and of Field, J., on p. 263, as to how the words "at owner's sole risk" were modified and qualified by the words "warehousemen" and "warehouse charges" in the notice.

In the present case the defendants did not hold themselves out as being "warehousemen;" and, as a matter of fact, they never made any "warehouse charges;" so that the sole ground on which the company were held liable in the *Mitchell* case is lacking in the present case. It also appears from the Govern-

ment certificates furnished that the defendant company in this case were not authorised to make any warehouse charges at Kingsville.

The trial Judge made no findings and did not pass upon the evidence, but I think it may be fairly inferred from the hesitation he speaks of, and in basing his decision upon the *Mitchell* case, by which he considered himself bound, that, upon the merits and the evidence, his opinion was not unfavorable to the defence except as to the law upon the question of "owner's risk," upon which I think he was mistaken.

I have no hesitation in coming to the conclusion that, where the plaintiff and Hall differ as to matters upon which they both speak, the evidence of Hall is to be preferred. For instance, as to the conversation over the long distance telephone, which Hall says took place on the 17th March, relating to the shipment of the 100 cases, the plaintiff in his examination for discovery admitted that it may have taken place, and he did not give any satisfactory reason for changing his testimony at the trial. He corroborates Hall by saying that it was Westcott who informed him of the arrival of the second consignment of 100 cases, and speaks of his having had a conversation with Westcott the morning of the trial, but he did not call him as a witness to contradict the testimony of Hall. On this very important point he is contradicted not only by Hall but by his own examination for discovery, upon which he was cross-examined at the trial.

The plaintiff is also contradicted by the witness Sharpe, who says he had a conversation with him in his own house on the Monday following the robbery. Sharpe, the route agent or inspector of the defendant company, who was investigating the robbery, says that he asked the plaintiff when he was first notified of the shipment of 100 cases being there. Brown told him that he had a talk with Mr. Hall over the telephone on the 17th March at Windsor, and that he told Hall he could not get down for a few days, and asked him if he could hold the shipment until he opened his house in Kingsville, all of which Brown denies at the trial.

Upon the whole, I am clearly of opinion that we should accept the testimony of Hall that it was agreed that the second consignment was left on the same terms as the first, at the plaintiff's risk, as Hall's truthfulness was not impeached and he was simply carrying out his policy as to the first consignment, and he had a much stronger reason for requiring it in the second case than in the first, on account of its size.

The next question that arises is as to the meaning of the words "owner's risk," which, in my opinion, the evidence clearly

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shews were made applicable to both of these consignments. This question has been settled for us by decisions which are binding upon us. The first of these I refer to is *Dixon v. Richelieu Navigation Co.*, 15 A.R. 647, 649, where Hagarty, C.J.O., says that "the words 'owner's risk' alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay." In the same case, Burton, J.A., said that "the cases fully establish that the words 'owner's risk' protect the defendants from all liabilities, except wilful misconduct." This case was taken to the Supreme Court of Canada and there affirmed - 18 Can. S.C.R. 704.

The principle of this case has been adopted and followed both in the English Courts and our own. See *Bullen v. Swan Electric Engraving Co.* (1907), 23 Times L.R. 258; *Reynolds v. Boston Deep Sea Fishing Co.* (1921), 38 Times L.R. 22; *Swale v. Canadian Pacific R.W. Co.* (1913), 29 O.L.R. 634, at p. 645, 15 D.L.R. 816; and *British Columbia Canning Co. v. McGregor* (1913), 26 W.L.R. 18.

The last matter to be considered is, whether the defendant company were guilty of such wilful neglect or misconduct with respect to these consignments as would make them liable to the plaintiff under the foregoing authorities. Hall, the agent of the express company, was also the Kingsville station agent of the Pere Marquette Railway Company, positions which he had filled for 12 years. He considered it a safe place, as it had been used for storing valuable goods during his time and before then. It was called the old bonded room because, before its being used for storing express goods, it had been used by the Customs authorities for goods remaining in bond. It had two doors: one a slatted door, which gave an entrance from the main station room and the express room, which was kept closed and under lock and key, and the other a heavy wooden sliding door in the rear wall leading to the outside, in the upper part of which there was a glass window with strong wooden slats. This door was secured on the inside by two iron hooks and staples, one about 18 inches from the bottom of the door and the other an equal distance from the top. These hooks and staples were made from iron rods about three-eighths of an inch in diameter. This door was not used either for bringing in or taking out anything from the bonded room. The last time it was opened previous to the burglary in question was two or three years before, when the room was being cleaned out. Hall, the railway and express company agent, was of opinion that it was a safe and suitable place for the storing of valuable goods.

Allan Sharpe, the route agent or inspector of the express company, says that he is familiar with the stations and express offices of his own and other companies, and considered this an exceptionally good one. He was advised of the burglary at once, and came to Kingsville to make an investigation. He found that both iron hooks in the sliding door had been tampered with, and, notwithstanding their great strength, had been partly straightened out, so that their bulging out was largely removed, and they no longer properly served their purpose as hooks.

James O. Brown, the town constable of Kingsville, a brother of the plaintiff, says he went to examine the door, the day after the burglary. He swears that the stem of the hook was about 6 or 7 inches long, made of three-eighths iron, and straightened out, so that there was not any bulge to it and it had not any clinching effect. The agent took hold of the big handle in his presence and gave it three jerks, and the hooks slid out. He tried it a second time but did not succeed.

It is worthy of remark that not a single witness favourable to the claim of the plaintiff speaks of his having ever seen the premises or their equipment before the mutilation of the hooks, and their whole testimony is based upon that being the normal condition.

It was argued before us that the statement of the company's agent to the plaintiff that the goods were under lock and key was not correct, on account of the sliding door having no lock, but only the hooks and staples. I think it may fairly be answered that two hooks and staples made up from iron rods three-eighths of an inch in diameter, with stems 6 or 7 inches in length, as testified by the plaintiff's brother, would be a great deal stronger than any lock that would in the ordinary course be placed on such a door. No doubt the agent had in mind the lock upon the slatted door between the main room of the station and the bonded room.

In my opinion, there is no evidence to sustain the charge of "wilful neglect" or "wilful misconduct" required by the authorities above cited, and the judgment appealed from should be reversed and the action dismissed.

Appeal allowed.

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[APPELLATE DIVISION.]

May 2.

Dec. 27.

MAJOR V. CANADIAN PACIFIC RAILWAY CO.

DROUILLARD V. DOMINION EXPRESS CO.

ROCHELEAU V. DOMINION EXPRESS CO.

Carriers—Intoxicating Liquors Purchased in and Shipped from Quebec to Ontario—Bill of Lading—Contract to Carry to Destination—Loss or Destruction of Goods in Transit—Action by Owners against Carriers for Value—Excuse for Non-delivery—Onus—Purchase and Importation for Purpose of Resale contrary to Law—Ontario Temperance Act—Dominion Act in Aid of Provincial Legislation, 6 & 7 Geo. V. ch. 19—Unenforceable Contract—Cause of Action Founded upon Illegal Act—Refusal of Court to Aid Owners—Prohibited Delivery to and Receipt by Carriers—Negligence—Possibility of Abandonment of Intention to Resell—Locus Penitentiae—Confiscation—Right of Crown—Possibility of Waiver.

Each of the plaintiffs purchased intoxicating liquors in the Province of Quebec and instructed the vendors to ship the liquors to the plaintiffs' several places of abode in Ontario; the vendors delivered the liquors to the defendants, a railway company and an express company, for transportation, and the defendants issued a bill of lading and receipts therefor. Embodied in each bill and receipt was a contract to carry to the destination named. Portions of the liquor were lost or destroyed in the course of carriage, and the plaintiffs sued for the value:—

Held, that the production of the bill of lading and receipts cast on the defendants the *onus* of proving or excusing delivery: they established that the goods were imported into Ontario for sale contrary to the Ontario Temperance Act, and that the contracts of carriage were made for the purpose and with the intent of sending the goods into Ontario contrary to the prohibitions contained in "An Act in Aid of Provincial Legislation prohibiting or restricting the Sale or Use of Intoxicating Liquors," 6 & 7 Geo. V. ch. 19 (Dom.); and it followed that the contracts to carry were, if not void, at least unenforceable, upon the principle that "no Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Holman v. Johnson* (1775), Cowp. 341, 343.

It was argued that the receipt of the goods by the defendants in Quebec was legal, that it was only the contract to carry into Ontario that was prohibited or illegal, and that proof of the delivery was in itself sufficient to call upon the defendants as bailees to account for the goods:—

Held, that, even if the rule were limited so as to make void or unenforceable only that part of the contract which the law prohibited, yet the obligations which arose out of the receipt must, in the circumstances, be found to arise out of an illegal or prohibited delivery and receipt: by the Dominion Act above referred to, he who "sends" contrary to law is guilty; and the delivery to be sent was part of the sending that was subsequently carried into effect in direct violation of the law.

Held, therefore, affirming the judgment of LENNOX, J., dismissing the actions, that it was the duty of the Court to refuse to aid the plaintiffs (MAGEE, J.A., dissenting).

Per MAGEE, J.A.:—No distinction can be made between a negligent act and a wilful act as an excuse for non-delivery to the plaintiffs of their goods. If the defendants could succeed in their defence, they could also succeed if they had wilfully destroyed or consumed the goods. Admitting that the liquors might have been confiscated to the Crown, that gave no right to a subject to confiscate them to himself; indeed, by doing so, he would deprive the Crown of its right.

Gordon v. Chief Commissioner of Metropolitan Police, [1910] 2 K.B. 1080, 1090, 1097, and *Feret v. Hill* (1854), 15 C.B. 207, referred to.

The possession of intoxicating liquors with intent to sell may be unlawful, but that intent may honestly and in good faith be abandoned: the plaintiffs should not be deprived of a *locus penitentiae*; nor of the chance of grace being shewn by the Crown after confiscation.

THESE three actions were brought against the defendants as carriers to recover the value of certain cases of intoxicating liquors shipped to the respective plaintiffs at Windsor from Montreal and stolen or destroyed while in the custody of the defendants.

The actions were tried by LENNOX, J., without a jury, at Sandwich.

F. D. Davis, for the plaintiffs.

John D. Spence, for the defendants.

May 2. LENNOX, J.:—(MAJOR'S CASE). On the 23rd March, 1920, Law Young & Co., liquor dealers in Montreal, acting for and as agents of the plaintiff, delivered to the defendant company in that city 50 cases of London Dry gin and 50 cases of Kilmarnock red label whisky, of the value of \$3,700, for transportation by the company's railway and delivery to the plaintiff at Windsor. The plaintiff's agents having become responsible for the payment of the freightage charges and signed a guarantee endorsed upon the bill of lading in these terms, namely, "We hereby undertake and declare that this shipment is of a class and shipped under conditions permitted by law," the company accepted the delivery of the said goods and agreed to carry them upon this condition and according to the terms of a bill of lading in a form approved by the Board of Railway Commissioners of Canada.

The goods arrived at Windsor, and the plaintiff was prepared to take delivery in due time, and he paid the freight upon the whole shipment, but the defendant company were only able to deliver 44 cases: 19 cases of gin and 37 cases of whisky having been stolen while the goods were in the custody of the company. The plaintiff claims to recover \$2,186.61 from the company and interest on this sum.

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There is only one question of fact to be considered, and upon the decision of this the liability or non-liability of the company, I think, must turn. Mr. Davis, however, argues that the plaintiff is entitled to recover in any event, because the right of action, as he contends, is founded on tort. If Mr. Davis had framed the statement of claim, and if the solicitor upon the record had not been so intimately connected with the preliminary stages of this and the Rocheleau and Drouillard actions, which followed the trial of this action, the argument would be more plausible, but it would still not be convincing. In the statement of claim it is said: "The plaintiff is a gentleman . . . and the defendant is a common carrier." This is all right as to both as far as it goes, but it is relevant to add to the plaintiff's description "and ex hotel keeper," for the plaintiff's contention is a bonâ fide importation, for home consumption, in conformity with the written undertaking and declaration of the plaintiff's agents; and the single issue presented by the defence is, whether or not the plaintiff had at the date in question really severed his connection with the liquor traffic, and only imported for his own personal needs, seeing—and there are many other cogent circumstances as well—that the plaintiff, being charged with illicit total sales, in close succession, of about 180 cases of liquor, including the 100 cases in question, and, summoned to attend the police court on the 14th May, informed the inspector that he had sold out his entire stock, and repeated this in court, and on his own confession was fined \$1,000 with costs. There is no evidence as to whether the plaintiff voluntarily retired or was forced out by the Ontario Temperance Act. At the trial the plaintiff claimed to be "a bottle a day man," or a little better some days. Having already provided for his own comfort by an investment of \$3,700, he immediately, and without waiting to know whether the company would recoup him for the loss of 56 cases, ordered in 60 cases more, a total outlay of say \$6,000, with about 20 cases still unaccounted for. It is a lot of money to apply personally, and the plaintiff looked anything but a wreck or debauchee—he appeared to be a shrewd, alert, healthy, well-preserved, well-dressed and well groomed business man—a typical landlord of the class who, ministering to the demands of all and sundry his patrons, leaves them to do the drinking. With the evidence of mere novices all about him making money in large sums and with little exertion, I am afraid that the lure of the old habit of ministering to the wants of others rather than his own became too strong for the plaintiff to resist, and, with modifications necessitated by legislation, he reverted to the most lucrative branch of his old calling, under the name in the plead-

ings mentioned, and that the stolen liquor was purchased and imported for the purpose and with the intention of re-selling it. Mr. Davis asks me to conclude that the plaintiff "lied like a gentleman" on the occasion of the police court investigation, but there is only one combination of circumstances that furnishes quasi-recognition of this character of excuse—immunity from financial sacrifice is not within the purview of "the code of honour"—and, even if I altogether ignore the police court incident, it does not go far in clearing away the imputation of a deliberate intention to evade the law. I cannot accept the plaintiff's evidence as given at the trial. I find that the 100 cases of liquor in question were purchased outside and imported into this Province for the purpose of sale and with the intention of disposing of it contrary to law. I find that the signed declaration of the plaintiff's agents was untrue to the knowledge of the plaintiff, and that the company accepted and acted upon it as a condition of the contract and in the belief of its truth. Assuming, but seriously doubting, and certainly without deciding, that the plaintiff might have framed his action and closed his case without resorting to the special contract entered into between the parties, the argument is to no purpose, for the plaintiff declared upon the special contract and put it in as proof of his case. The transaction was clearly contrary to public policy—the policy of both the Province and Dominion — as declared by statute, and the Court cannot assist the plaintiff in such case.

There will be judgment dismissing the action with costs.

(DROUILLARD'S CASE). This is the second action, in the order of trial, in the liquor series which I tried at Sandwich. Each case is, of course, to be determined upon its own facts, however strong the family resemblance may be. It happened that Mr. Lafferty, the solicitor in three of them, was induced to lend his assistance in all of them, I think, in the initial stages of the trouble, although his identity was not disclosed by the correspondence until the claims were about ripe for action, and it is unfortunate, I think, that he dabbled in these matters in a way to necessitate his becoming a witness, and occasioning the need of a good deal of evidence by way of explanation. It happened that this plaintiff, the plaintiff in number three (and possibly Mr. Major, I do not know), resided in the neighbourhood of the river, a locality adapted to carrying on an illicit traffic, that in both instances sickness in the family was the cause of the changed purpose leading to the sudden disposal of the household stores, and that in both an anxious purchaser accidentally ar-

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rived immediately the decision to sell was arrived at. It happened that these two plaintiffs, old friends and neighbours, were upon the same mission in Montreal at the same time, and it happened that, for alleged reasons to be referred to, neither would allow the company to make good the loss by a subsequent delivery.

The plaintiff has a family and makes a precarious living as a butcher and farmer. I say precarious because, taking his own statements, his gains ranged from \$400 to \$4,000 a year. He did not say that the \$4,000 a year came more than once, and I am satisfied that his verbal account of profits, of which he produced no record, was greatly exaggerated. He says 1920 was a bad year, but nevertheless he purchased 80 cases, principally gin, for his own use. He repudiated the idea of a heavy daily consumption, but friends would frequently come in of an evening, and the social gathering would consume 5 or 6 bottles upon each occasion. I think he intimated that this would occur about once a week.

He did not say that they paid for what they got or contributed ratably, but no man in the position of the plaintiff, and with a family to provide for and with a conscience, would dream of furnishing this weekly revel without some equivalent. I do not think the meetings occurred, but it is the reason put forward by a light drinker for his large requirements. His outlay was \$2,650 exclusive of express charges and the expense of his journey to Montreal, practically the accumulations of his lifetime, if, in fact, it was his own money. There is no object in reviewing the evidence. I cannot believe that any head of a family would be so insensible to the claims of his wife and children as to squander his and their resources in this reckless way. He admits the sale, but says this was not his intention at the time he bought it. The story is very simple: part of the shipment was lost or destroyed in a wreck caused by a collision. I quite agree that, if the purchase was an honest one and within the law, the railway company were the servants of the defendant company, and the latter are responsible for the manifest negligence of their agents and servants: *F. T. James Co. v. Dominion Express Co.* (1907), 13 O.L.R. 211.

The residue was delivered to the plaintiff in May, 1920, and the vigilance of the police and their frequent inspection of the premises prevented the possibility of a sale until October. Having found everything all right in the meantime, and some of the officials having left Windsor, the police supervision relaxed in the month of October. Just then, as the plaintiff's story is, he became ill, the doctor warned his wife of the risk incurred by

the plaintiff if he drank at all, a family consultation followed, it was decided to sell out, an inquiring bootlegger happened along almost at once, and the stock was sold at a large net profit even after the payment of the usual fine. The wife was not called, the doctor was not called, the banker was not called, and the absence of none of them was accounted for. The plaintiff's story throughout was one peculiarly calling for corroboration, and, if true, corroboration was easy.

I find that the liquor in question was purchased and imported into Ontario in violation of the laws of the Province and the Dominion and for the purpose and with the intention of selling it.

The frame of the action and character of proof was the same as in the Major case and I need not repeat what I said there. In such case the Court leaves the wrongdoer where it finds him.

The action will be dismissed with costs.

(ROCHELEAU'S CASE). There is a difference in detail of course, but in general outline the character of the purchase and importation is substantially the same as in the Major and Drouillard actions, tried at the same court and just decided. To Mr. Davis's contention that, although the plaintiff might fail in an action *ex contractu* and still have a right to damages as for a tort committed by the company as common carriers, the answer is, as in the action just referred to, the action is brought for breach of contract, a special written contract entered into between the parties in a form duly approved by the Board of Railway Commissioners for Canada; the plaintiff rested his case upon proof of this contract, and could not have made a *prima facie* case without it; and, if it turns out to be a fact that the transaction on the plaintiff's side was illegal, he cannot recover.

The plaintiff is a market gardener, owning and cultivating 35 acres of land, which, by reason of a speculative increase of value, or holding prices, in the neighbourhood, he says is worth \$30,000. He called no evidence of value, and, being in the subdivision area or locality somewhere round about Sandwich, it would not be surprising if, put upon the market, he could not realise 30 per cent. of the value he deposed to. He spoke of also having two mortgages of a total face value of \$5,000, but gave no particulars. If they represent balance of consideration money upon sales of subdivision lands, made during a boom period, and they may be for anything that appears, I would not like to hazard an opinion as to what they are actually worth. In addition to all this, he says that in the spring of 1920 he had \$4,500 in cash, the proceeds of years of accumulation, *never*

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banked, and of those earnings of years he says he appropriated \$4,065 to the purchase of 135 cases of liquor in Montreal for his own use.

Part of it was destroyed in a collision for which the company is responsible in damages, if not relieved by reason of illegality. Seventy cases were saved from the wreck and delivered to the plaintiff. Of these he did in fact sell 65, for which he was fined, and, after paying everything, he came out with a profit and 5 cases for his own use. In this case the alleged illness of the wife and her objection to the smell is said to be the reason for the plaintiff's change of mind.

The question for decision is, was this liquor purchased and brought into Ontario with the intention of selling it, or the most of it, as the plaintiff in fact did? I am satisfied that that was the plaintiff's purpose and intention.

The action will be dismissed with costs.

The plaintiffs appealed from the judgments of LENNOX, J., in the three actions.

October 12. The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, J.J.A.

F. D. Davis, K.C., for the appellants, said that the judgments in appeal had all been put upon the ground that the appellants were guilty of an illegal act in sending liquor into Ontario for the purpose of sale, and that therefore the law would not aid them in recovering damages. At the time of the purchase of the liquor in each case it was lawful to purchase for one's own use. Therefore the presumption was that the intention in purchasing was legal, and this presumption had not been rebutted. There was not sufficient evidence for the Judge to find wrong intent. The defendants could not take advantage of the illegal purpose as a defence. Even if there was illegal intent, it should not prevent the appellants from recovering: Halsbury's Laws of England, vol. 4, p. 8; *Feret v. Hill* (1854), 15 C.B. 207. The appellants were entitled to succeed either in contract, or in tort. The defendants were common carriers, and so were insurers. Even if the bill of lading and the express receipts were void as being contracts to carry, yet in part, that is, inasmuch as they were receipts, a legal cause of action could be founded on them.

John D. Spence, for the defendants, respondents, relied on the defence of illegality broadly, and referred to the Dominion Act in aid of Provincial legislation prohibiting or restricting the sale or use of intoxicating liquors, 1916, 6 & 7 Geo. V. ch. 19,

secs. 1 (a) and 4, and the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, secs. 40, 49, and 70. The evidence as to illegal intention was ample, and the learned trial Judge so found. Each of the plaintiffs had sent and imported liquor into Ontario for the purpose of sale, contrary to the laws of Ontario. He referred to *Holman v. Johnson* (1775), 1 Cowp. 341; *Fivaz v. Nicholls* (1846), 2 C.B. 501; *Farmers' Mart Limited v. Milne*, [1915] A.C. 106; *Fleming v. Manchester Sheffield and Lincolnshire R.W. Co.* (1878), 4 Q.B.D. 81; *Lyles v. Southend-on-Sea Corporation*, [1905] 2 K.B. 1; *Collins v. Blantern* (1767), 2 Wils. 341. The goods were lost or destroyed without negligence; at the time the liquor was stolen or destroyed, it was liable to confiscation, and so the appellants suffered no loss.

Davis, in reply, referred to Halsbury's Laws of England, vol. 7, p. 392.

December 27. FERGUSON, J.A.:—In each of these actions the plaintiff appeals from a judgment of Lennox, J., dismissing the action.

The three actions were tried together, and the three appeals were argued together. The claims arise out of shipments of liquor by the plaintiffs into Ontario and the loss of part of the liquor by the defendants. Each plaintiff purchased liquor in Montreal from dealers there, paid for it, and instructed the liquor dealers to ship the liquor each had purchased to their several places of residence in Ontario; the liquor dealers delivered the liquor to the carriers for transportation. In the Major case the liquor was delivered to the railway company, and they issued their usual bill of lading, which consists of a receipt for the liquor and a contract to carry it.

In the other two cases the liquor was delivered to the Dominion Express Company, and express receipts were given therefor. Embodied in each receipt is a contract to carry to destination named.

The defences to the actions are:—

- (1) That the goods were lost or destroyed without negligence.
- (2) Illegality in the making and purpose of the contracts, in that each of the plaintiffs sent and imported the liquor into Ontario for the purpose of sale, contrary to the laws of Ontario; that sending and importation for such purpose is prohibited by Act of the Parliament of Canada, intituled "An Act in Aid of Provincial Legislation prohibiting or restricting the Sale or Use of Intoxicating Liquors," 1916, being ch. 19 of 6 & 7 Geo. V. That Act (sec. 1) makes it an offence for "any person . . . by himself, his clerk, servant or agent . . . (to) send, ship, take,

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bring or carry or cause to be sent," etc., "into any Province . . . intoxicating liquor, knowing or intending that such intoxicating liquor will or shall be thereafter dealt with in violation of the laws of the Province into which such intoxicating liquor is sent," etc.

(3) That at the time the liquor was stolen or destroyed, it was liable to confiscation, and therefore the plaintiffs suffered no loss.

Part of the liquor shipped under the railway contract was stolen from the railway yards in Windsor, and part of the liquor that was shipped by Dominion express was destroyed in a head-on railway collision. Counsel for the defendants did not urge that the defendants had in any of the cases given sufficient evidence to relieve them from liability under legal and valid contracts of bailment and carriage, but in each case contended that the liquor was shipped into Ontario contrary to the law, and for that reason the contracts were illegal and void, or that the plaintiffs could not rely on the acknowledgment of receipts or contracts to carry contrary to law, as foundation for their respective claims.

The learned trial Judge found as a fact that each of the plaintiffs sent and imported his liquors into Ontario for the purpose of sale, contrary to the Ontario Temperance Act, and I am unable to say that these findings are not justified by the evidence.

It appears well established that, "if money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." Mellish, L.J., in *Taylor v. Bowers* (1876), 1 Q.B.D. 291, 300.

The first part of the foregoing proposition has been questioned: see *Kearley v. Thomson* (1890), 24 Q.B.D. 742; but the latter part of it has never been questioned: see *Scheuerman v. Scheuerman* (1916), 52 Can. S.C.R. 625, 28 D.L.R. 223.

The principle is: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." Lord Mansfield in *Holman v. Johnson*, 1 Cowp. 341, 343; see also *Armstrong v. Toler* (1826), 11 Wheat. (U.S.S.C.) 258. In *Holman v. Johnson*, Lord Mansfield stated the law as follows (p. 343):—

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in

the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

The law does not deprive the owner of his title to the goods or moneys because he has parted with the possession thereof for an illegal purpose, but the Courts will neither enforce a contract made for an illegal purpose, nor aid him who has parted with the possession of his goods for an illegal purpose if that purpose has been accomplished, and, to establish his title or right to possession, he requires any aid from the illegal transaction. See *Taylor v. Bowers*, *supra*; *Farmers' Mart Limited v. Milne*, [1915] A.C. 106; and Leake on Contracts, 5th ed., pp. 552-4; Smith's Leading Cases, 12th ed., vol. 1, p. 454.

The appeals appear to turn on whether or not the facts of these cases bring them within these well-established rules of law or practice.

The production of the bill of lading and receipts cast on the defendants the onus of proving or excusing delivery: they, to the satisfaction of the trial Judge, established that these goods were imported into Ontario for sale contrary to the laws of Ontario, and that the contracts of carriage were each made for the purpose and with the intent of sending the goods into Ontario contrary to the prohibitions contained in the Act of the Parliament of Canada 6 & 7 Geo. V. ch. 19, from which it seems to follow that the contract to carry, if not void, is, at least unenforceable.

Counsel for the appellants argued that, even if the contracts to carry are void or are not enforceable, yet the bill of lading and the express receipts are instruments two-fold in their character, that is, they are firstly acknowledgments of the receipt of the goods, and secondly they are contracts to transport and deliver; that causes of action arose out of the acknowledgments of receipt, separate, distinct, and different from the causes of action that arose out of or were imposed by the contract to

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carry; that the receipt of the goods was legal, and it was only the contract to carry into Ontario that was prohibited or illegal; that proof of the delivery of the goods was in itself sufficient to call upon the defendants to account for the goods as bailees; that, as bailees seeking to account for goods destroyed or lost while in their possession, the defendants must shew circumstances negating negligence: *Phipps v. New Claridge Hotel Limited* (1905), 22 Times L.R. 49; *Williams v. Curzon Syndicate Limited* (1919), 35 Times L.R. 475; and that the defendants do not contend that they have established loss without negligence.

These contentions bring me to a consideration of the following questions: Is it the law or the policy of the law that, if the shipper, at the time of depositing the goods and making the contract of shipment, deposits and contracts with the intent and purpose of importing the liquor into another Province for a purpose prohibited by law, the whole contract is rendered void, and that none of the duties and obligations which the law imposes on a carrier in respect of the care and redelivery of the goods are enforceable, or is the policy and effect of the law such as to make void or unenforceable only that term or obligation of the contract which provides for illegal carriage into a Province to which importation is prohibited?

The statutes relied upon by the defendants do not declare that such contracts shall be void: the defendants' bills of lading have been made evidence of title and negotiable instruments the transfer of which carries the title to the goods; in the hands of the plaintiffs at Montreal, or while the goods were in Montreal, these documents might have been used to transfer the goods to innocent purchasers, who might have shipped the goods into Ontario for legal purposes; and I do not think it is the policy of the law to render these negotiable commercial documents absolutely void if it be shewn that one party to them entered into the contract and received them for an illegal purpose; but, in the hands of an innocent transferee, a bill of lading obtained under such circumstances might be the foundation of an enforceable claim; in other words, I think the law only avoids the contract in so far as it is necessary to prevent being done that which the law prohibits.

That illegality in the making of a contract is not always enough to void the whole contract or to require the Court to refuse its aid for the enforcement of any provision of the contract, and that the Court will look at and consider the policy of the law in granting or refusing aid to a plaintiff suing on such a contract, and will only refuse its aid to enforce the part of the contract which is contrary to the express provisions and policy

of the law, was, I think, the view taken by the Supreme Court of the United States in *Merchants' Cotton Press and Storage Co. v. Insurance Co. of North America* (1894), 151 U.S. 368. There the shipper and the railway company entered into a contract for the shipment of goods at a rate which, the Court assumed for the purpose of decision, the plaintiff knew contravened the provisions of the statutes of the United States prohibiting carriage at a rate other than that established by the Inter-State Commerce Board. The goods were destroyed, and in the action the defendants sought to set up the illegality of the transaction as a defence to their liability under the contract; the Court was of opinion that the contract of carriage was not prohibited, but only that part of the contract which provided for an illegal rate; so in the cases at bar it may be argued that the undertaking in the bill of lading to carry into Ontario does not render void and unenforceable the implied agreement to care for and redeliver.

It may be further argued that sec. 1 of the Dominion Act, providing for confiscation, and sec. 70 of the Ontario Temperance Act, providing for seizure and confiscation of the goods and prosecution of the owner for keeping for sale, recognise that the illegal shipper is the owner and the custodian of the goods; and that, as, under the Dominion Act relied upon by the defendants, confiscation can only follow a third offence, and under the Ontario Act confiscation can only follow seizure and legal inquisition, it cannot be the intent and purpose of the law to relieve the defendants from the great and onerous obligation which the common law imposes upon carriers or bailees of goods, but only from the obligation to carry them contrary to law: *Kerrison v. Cole* (1807), 8 East 231.

These arguments make in the plaintiffs' favour, but I do not think they go far enough, for it seems that, even if we limit the rule so as to make void or unenforceable only that part of the contract which the law prohibits, yet the obligations which arise out of the receipt must, in the circumstances of these cases, be found to arise out of an illegal or prohibited delivery and receipt.

The Dominion Act provides that he who "sends" contrary to the Act shall be guilty; and, in my view, the delivery to be sent was part of the sending that was subsequently carried into effect in direct violation of the law—the delivery was made with the intent and purpose that the law should be violated, and, even if the receipt and contract to carry were not absolutely void, and might be made the foundation of a claim by an innocent transferee of the bills, yet the plaintiffs cannot make receipts obtained and contracts entered into by them with the intent and

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purpose that the law should be violated, the foundation of their claims, at least not where the illegal purpose has been accomplished.

The defendants did not set up this defence for the purpose of protecting the public, and, in my view, they are not entitled to much credit for setting it up. If I could find a way to deprive the defendants of any advantage from such a plea I would do so, but I am unable to find that the plaintiffs have proven contracts or causes of action other than such as are contained in or arise out of the transactions evidenced by the bill of lading and receipts, and the defendants have established that the deposits and contracts evidenced by these bills were made and entered into with the intent and purpose that the law should be violated, and that such illegal intent and purpose was in each case accomplished, and therefore that the claim of each of the plaintiffs is based upon an illegal and prohibited act or transaction and cannot be supported without reference thereto or aid therefrom, and the authorities I have cited, as well as those collected, reviewed, and considered in Broom's Common Law, 9th ed., pp. 346 to 352, and Smith's Leading Cases, 12th ed., vol. 1, pp. 417 and 449, make it clear that it is the duty of the Court to refuse to aid these plaintiffs.

I am, for these reasons, of the opinion that the appeals must be dismissed with costs.

The result I have arrived at renders it unnecessary for me to consider the question of damage, but I incline to the view that up to seizure under sec. 70 of the Ontario Temperance Act the plaintiffs might have changed their intent to sell contrary to the Act, and in these cases we could not say that at the time the losses occurred the time for repentance and change of intent had arrived, been passed, and lost.

MEREDITH, C.J.O., and MACLAREN, J.A., agreed with FERGUSON, J.A.

MAGEE, J.A. (dissenting) :—The plaintiff in each of these cases alleges in his statement of claim that on a specified date in April or May, 1920, a specified number of cases of liquor belonging to him was delivered to the defendants, common carriers, at Montreal, in the Province of Quebec, to be safely carried and delivered to him at Windsor, in the Province of Ontario, but that only part was delivered to him—the defendants alleging that the rest was missing and either stolen or destroyed; and the plaintiff in each action claims the value of that not so delivered.

The defendants the railway company say that they carried Major's liquor to Windsor, but there, without their negligence, the car containing it was broken into and the missing part of the liquor taken, and it had been received by them under the terms of a bill of lading by which it was undertaken that the shipment was of a class and shipped under conditions permitted by law, but that, without the defendants' knowledge, the plaintiff was engaged in unlawful traffic in liquor, and the importation into Ontario and carriage and delivery within Ontario were contrary to law, and Major is debarred from bringing his action.

The express company in each of the other two cases similarly say that the liquor was received by them under the terms of a receipt therefor given by them whereby they were not to be liable for any loss caused by the authority of the law or the act or default of the shipper or owner, and that, without their negligence, the car containing the liquor was wrecked in a railway accident and part of the liquor was destroyed and as much of what remained as could be identified as the plaintiff's was delivered to him, but that subsequently they discovered that the liquor had been purchased by the plaintiff for an unlawful purpose, and its importation into Ontario and its carriage and delivery within Ontario were contrary to law, whereby each plaintiff is debarred from maintaining his action.

It will be observed that each plaintiff is claiming, not damages for the breach of any contract, but only the value of goods belonging to him in the defendants' possession. The fact of the destruction or theft of the goods having been caused by negligence is not seriously questioned. The question here is really that of illegal ownership in the plaintiff and his right to recover his goods or their value.

It does not appear to me that any distinction can be made between a negligent act and a wilful act as an excuse for non-delivery to these plaintiffs of their goods. If the defendants can say, "We negligently destroyed your goods and you cannot recover from us," then equally they can say, "We wilfully destroyed or allowed our servants to consume or destroy your goods and you are without remedy."

If these defendants can succeed, then they and their employees can confiscate to their own purposes all liquor received from shippers whose ownership of it in Ontario is unlawful, and not only all liquor but all goods of whatever sort, if they can only establish that the acquisition or possession of or right to the goods by those claiming them was illegal, although no one

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else has title. And a man who finds his servant making off with an illegal bottle which he has told him to bring from the cellar cannot take it from him or recover it by law and may be liable for assault if he tries to take it by force.

The defendants admit and assert that they did not learn till after their failure to deliver the liquor that the alleged illegality in the transmission or even ownership existed: they therefore would have been free from blame had they given up to the plaintiffs the property which belonged to them and would not have been contravening the law.

Let it be admitted that by proper proceeding the liquor might have been confiscated to the Crown: that gives no right to a subject to confiscate it to himself; indeed, by doing so he is thereby depriving the Crown of its rights and of what might ultimately be its property. As pointed out in *Gordon v. Chief Commissioner of Metropolitan Police*, [1910] 2 K.B. 1080, by Fletcher Moulton, L.J., at p. 1097, to uphold the judgment there reversed would be to say that a constable might pocket and keep for his private use money found on a prisoner as being illegally obtained by street-betting, or any member of the public present might do so, and there would be no reason even why the constable should pay it to the Commissioner of Police. In that case Vaughan Williams, L.J., p. 1090, considers it clear that the principle that the Court will not assist a plaintiff to recover money which has been obtained in an illegal transaction applies to actions for the recovery of property as well as actions on contracts tainted with illegality, and would also apply where the defendant is not a party to the original illegality. There the plaintiff sued for return of money illegally acquired by him in street-betting, and which, it was argued, was liable, by proper procedure before a proper tribunal, to have been confiscated to the Crown, and which had in fact been seized by the police in a betting house, and the trial Judge assumed rightfully held by them as evidence in a prosecution of the plaintiff and others in which the plaintiff was acquitted. The trial Judge had dismissed the action because of the illegality of the acquiring of ownership, but the Court of Appeal reversed the judgment, and the plaintiff recovered the money as being his property unlawfully withheld, even though the original obtaining might be lawful. In *Feret v. Hill*, 15 C.B. 207, the tenant recovered possession though he had acquired the term with illegal intention, and the landlord, the defendant, like these defendants, had no knowledge of the illegality.

Let it be granted that the liquor was the weapon by which

the plaintiff intended to break or did break the law: the criminal does not lose his property in his weapons or tools because he has used them for crime. The Crown may have a right to obtain possession of them, through proper officers or procedure, as evidence, but until then the right of property and possession remains.

So the possession of liquor with intent to sell may be unlawful, but that intent may honestly and in good faith be abandoned. Yet to allow judgment for those in the position of these defendants might well deprive the owners of property of that *locus pœnitentiæ* at which those having the intention of going wrong might well halt.

Special circumstances also might lead the Crown, even after liquor had been under proper procedure confiscated, to forgo its rights wholly or partly. But, if these defendants are not liable to restore either the goods or their value, they may take it upon themselves to deprive both the owner and the Crown of any opportunity of shewing grace.

I would allow the appeals.

Appeals dismissed (MAGEE, J.A., dissenting).

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PULLAN v. SPEIZMAN.

Sale of Goods—Contract—Unascertained Goods Sold by Description—Provision as to Shipping—Free on Board Cars of Designated Railway—Duty of Buyer to Provide Car—Duty of Seller to Load—Loading by Mistake on Car not Routed for Destination of Goods—Unloading and Removal to Warehouse—Destruction by Fire in Warehouse—Reasonable Opportunity of Shipping not Occurring before Fire—Embargo—Goods not Appropriated to Contract—Property not Passing—Return of Part of Purchase-money Paid.

In an action to recover money which the plaintiff had paid to the defendant on account of the price of unascertained goods sold by the defendant by description to the plaintiff, the plaintiff alleging that the contract of sale was cancelled in the exercise of a right given by the contract:—

Held, that, the contract being for a sale free on board, it was the plaintiff's duty to provide an effective means of conveyance to the place to which he desired the goods to be shipped.

H. O. Brandt & Co. v. H. N. Morris & Co. Limited, [1917] 2 K.B. 784, followed.

The plaintiff did not provide an "effective" car, and the duty of the defendant to load the goods did not arise; but, under a mistake, the goods were loaded into a car, and, when it was found that that car could not go to H., the place designated by the plaintiff, the goods were unloaded and placed in a warehouse, where they were destroyed by fire:—

Held, that, if the goods had been loaded upon a car routed for H., that would have been an appropriation by the defendant with the assent of the plaintiff sufficient to effect the passing of the property in the goods to the plaintiff, for his assent would properly be implied; but the assent could not be implied because the car was not routed for H.; and, *semble*, the shipment was not complete until the bill of lading of the railway company had been obtained and was available to the plaintiff.

The contract provided that the goods were to be shipped via two specified railways. Up to the time of the fire there was no reasonable opportunity (by reason of an embargo) for the plaintiff to provide a car that would be billed to H. via the two railways:—

Held, that, there having been no default by the plaintiff in providing a car up to the time of the fire, and the property not having passed to the plaintiff, he was not liable to pay for the goods and was entitled to the return of the money he had paid on account of the purchase-price.

Judgment of DENTON, Co. C.J., affirmed.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.—

This is an appeal by the defendant from the judgment of the County Court of the County of York (DENTON, Co.C.J.), dated the 7th March, 1921, which was directed to be entered after the trial before him sitting without a jury on that day.

The action is brought to recover \$300 paid by the respondent

(the plaintiff) to the appellant on account of the price of 21,000 pounds of sisal ropes sold to him by the appellant, and the claim to recover is based upon the contention that the contract for sale was cancelled in the exercise of the right which the respondent was given by the contract to cancel it in the event which happened; and the appellant counterclaims for the balance of the price of the sisal and some other articles: \$13.30 for 38 pounds of merchant tailor clips at 35 cents per pound, and \$81.50 for 2,330 pounds of sisal string at $3\frac{1}{2}$ cents per pound. The respondent admits that he owes for the clips, but says that the price was 32 cents per pound, and he also admits his indebtedness for the sisal string as claimed.

The learned trial Judge gave effect to the claim of the respondent, and allowed him, in addition to the \$300, \$43.72, which he said the appellant admitted he owed to the respondent, and from these two sums he deducted \$76.23, which he said the respondent admitted, leaving a balance in favour of the respondent of \$267.49, for which he gave him judgment with costs.

In passing it may be pointed out that the amount admitted by the respondent was not \$76.23, but \$93.66, made up of the 38 pounds of clips at 32 cents per pound—\$12.16—and \$81.50 for the sisal string.

The facts are not seriously in dispute. The contract is evidenced by an order signed by the respondent dated the 25th March, 1920. It is on a printed form, and the subject of the order is "approximately 2,100 lbs. new sisal rope, similar to sample submitted," and the price is \$3.70 per "hhd." It provides that "E. Pullan will furnish A. Speizman with shipping instructions next week;" and that payment is to be made "30 days dft. from day of shipment. Mr. Speizman will be responsible for quantity and quality of goods."

There is a further provision in these words: "We reserve the right to cancel all or part of this order if the material is not shipped within the time specified."

This order was accepted in writing by the appellant.

On the following day, the respondent wrote to the appellant the following letter:—

"March 26th, 1920.

"Mr. A. Speizman,
69 Queen Street,
Kingston, Ontario.

"Dear Sir:

(*Address Reply to Rag Department.*)

"Confirming our conversation to-day, regarding shipping

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instructions for the sisal rope we purchased from you, please ship same to

E. Pullan,
Willow Avenue Station,
Hoboken, New Jersey.

“This is to be shipped viâ C.P.R. and West Shore Railroad delivery. Kindly ship this stock as a car-load, providing that there is more than 20,000 lbs. If there is less than 20,000 lbs., ship it as a less car-load shipment. It is understood of course that you will attend to the necessary export entries and consular invoice.

“Kindly follow the above instructions exactly as given to you, and if there is anything you do not understand, please let us know immediately. Please send us the signed bill of lading and invoice as soon as you make the shipment.

“Yours very truly,

“E. Pullan.”

The sisal which the appellant agreed to sell was purchased by him from John Julius Block, in whose possession it was in Kingston, and it was arranged between them that Block should attend to the shipment of it. There was, at the time the contract was made, a railway embargo which prevented the shipment being made to Hoboken, or, as I understand it, to any point in the Eastern United States. Block applied to the agent of the Canadian Pacific Railway Company at Kingston for a car for Hoboken, and the agent, by mistake, not knowing of the embargo or forgetting that it existed, placed a car at the disposal of Block, who loaded into it the sisal. In a very short time the mistake was discovered, and Block was told that the car could not go to Hoboken, and it was then unloaded, and the sisal was taken back to Block's premises, where it was subsequently destroyed by an accidental fire. It appeared in evidence that the embargo was “lifted” on the 4th May following, and was not put on again until the 14th of that month.

October 14. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, J.J.A.

Christopher C. Robinson, for the appellant, argued that it was the duty of the buyer to provide the cars. When the appellant had put the goods on board cars at Montreal, his duty was done. There was an appropriation, and so the property passed: *Marshall v. Jamieson* (1877), 42 U.C.R. 115; *H. O. Brandt & Co. v. H. N. Morris & Co. Limited*, [1917] 2 K.B. 784. If the property passed, the appellant was entitled to the

price; if not, he was entitled to the deposit, because the respondent had no right to cancel the contract: *Denny v. Skelton* (1916), 86 L.J.K.B. 280. Counsel also urged the appellant's counterclaim of \$13.30 for 38 pounds of merchant tailor clips at 35 cents per pound and \$81.50 for 2,330 pounds of sisal string at 3½ cents per pound.

J. Singer, for the respondent, contended that there had been no appropriation of the goods to the contract. The case of *Vipond v. Sisco* (1913), 29 O.L.R. 200, 14 D.L.R. 129, shewed that, to be appropriated, the goods must be delivered to "the designated common carrier." This had not been done in the present case. The rules as to ordinary f.o.b. contracts did not apply here, because it had been agreed outside the contract by the parties that the vendor should supply the car. The matter was just as if the appellant had not put the goods on the car at all. The contract for sale was cancelled in the exercise of the right which the respondent was given to cancel it.

Robinson, in reply, referred to Blackburn's Contract of Sale, 3rd ed., p. 137 *et seq.*

December 27. The judgment of the Court was read by MEREDITH, C.J.O. (after setting out the facts as above):—The evidence establishes clearly, I think, that Block was anxious to carry out the respondent's shipping instructions, and made reasonable endeavours to do so; and there is, I think, much force in his statement that, although the embargo was off during the period mentioned, it was difficult, if not practically impossible, owing to the mass of commodities required to be shipped that had accumulated while the embargo was on, to get a car for the shipment of the sisal to Hoboken.

It is equally clear, I think, that the appellant was anxious to get delivery, and the whole difficulty as to the shipment to Hoboken arose from conditions over which neither the appellant nor the respondent had control; and the case, therefore, falls to be determined according to the strict rights of the parties.

The learned trial Judge seems to have thought that the duty of providing a car to receive the shipment of the sisal rested upon the appellant. I do not so think, but am of opinion that, the contract being for a sale free on board, that duty rested on the respondent—that is, under such a contract the duty rested on the respondent to provide an effective means of conveyance to the point to which he desired that the sisal should be shipped; that is settled law: *H. O. Brandt & Co. v. H. N. Morris & Co. Limited*, [1917] 2 K.B. 784, 795, 798.

In that case the contract was for the sale and purchase of

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aniline oil, f.o.b. Manchester. When the contract was made, there was no prohibition against the export of such oil, but the prohibition was subsequently imposed unless a license was obtained, and what was held was that it was the duty of the buyers to provide an effective ship, i.e., a ship which could legally carry the goods, and that it was then that the seller's duty to put the goods on the ship arose.

In the case at bar, the respondent did not provide an "effective" car, and the duty of the appellant to load the goods did not arise; but, as I have said, under a mistake as to the possibility of that car being "routed" to Hoboken, the sisal was loaded into a Canadian Pacific Railway car, and, when it was found that it could not go to Hoboken, as I have said, the sisal was unloaded and placed in Block's warehouse.

It was argued by counsel for the appellant that the putting of the goods into the car, notwithstanding the mistake, was an appropriation of them to the contract sufficient to pass the property in them to the respondent.

It is undoubtedly the law that where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract by the seller with the assent of the buyer, the property in the goods then passes to the buyer, and that the assent may be express or implied and may be given either before or after the appropriation is made.

It is a proper conclusion from the conduct of the parties that, if the sisal had been loaded upon a car routed for Hoboken, that would have been an appropriation by the appellant with the assent of the respondent sufficient to effect the passing of the property in the sisal to the respondent, for his assent would properly be implied. But can the assent be implied where the sisal was not loaded upon a car routed for Hoboken but upon a car that was not destined for that point? I think not. My view is that it was only when the sisal was loaded upon a car routed for Hoboken that the assent to the appropriation would be implied. I am inclined to think also that the shipment was not complete until the bill of lading of the railway company had been obtained and it was available to the respondent.

It follows from this that the appellant is not entitled to recover the purchase-price, but his remedy is for the recovery of damages for the breach of the contract owing to the respondent's failure to provide a car in which the sisal could be shipped, if the failure to do that constituted a breach of the contract, and the measure of his damages would be the difference between the contract price and the market value of the sisal at the time

the breach occurred. The case is further complicated by the fact that the sisal has been destroyed by fire. If at the time the fire occurred there had not been the breach by the respondent of the contract, I do not see how the respondent can be made liable for any damages or why he should not recover the amount of the payment he had made on account of the purchase-price. The fire occurred on the 20th June, and from the time the contract was made until that day at least the embargo was on except for the few days in May during which, as I have mentioned, it was off. This embargo affected shipments to Hoboken viâ the West Shore Railroad, but there was no embargo on shipments viâ the New York Central Railway, except between the 2nd and 20th April and the 12th June and 2nd July. I think that the respondent was entitled to have the sisal shipped to Hoboken viâ the Canadian Pacific and West Shore Railways, and that he was not bound to accept shipment by any other route.

It is manifest from the testimony of Block that in his view, up to the time of the fire, there was no reasonable opportunity for the respondent to provide a car that would be billed to Hoboken viâ the two railways over which it was to be carried to its destination. In that view Block was, I think, right, and it can hardly lie in the mouth of the appellant to assert the contrary, in the face of the testimony of Block, who was put forward by him to shew that that was the case.

It follows that, there having been no default by the respondent in providing the car up to the time of the fire, and, as I have said, the property not having passed to the respondent, he was not liable to pay for the sisal and is entitled to the return of the money he had paid on account of the purchase-price. See also *Colley v. Overseas Exporters*, [1921] 3 K.B. 302; *Schmidt v. Wilson* (1920), 47 O.L.R. 194, per Logie, J., at p. 200, affirmed (1920), 48 O.L.R. 257, 55 D.L.R. 516.

For these reasons I would affirm the judgment, varying the amount awarded to the respondent by reducing it by \$27.43, and I would direct that the costs of the appeal be paid by the appellant.

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Appeal dismissed.

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Criminal Law—Assault—Death of Person Assaulted Following Assault—Right of Crown to Prosecute for Lesser Offence—Withdrawal of Case from Jury—Question Stated by Trial Judge for Determination by Court—Criminal Code, secs. 1014 to 1018—Procedure Adopted by Trial Judge—Trial Adjourned till after Judgment on Stated Case—Admission of Prisoner to Bail.

In an altercation the prisoner struck B., and afterwards L. also struck B. several times. B. died within a few hours thereafter from the effect of the blows. The surgeon who performed an autopsy on the body was unable to distinguish the injury caused by the blow struck by the prisoner from the injuries caused by the blows struck by L., or to say what effect the blow struck by the prisoner had. The prisoner and L. were both charged with the murder of B.: the grand jury found "no bill" against the prisoner and a "true bill" against L. The Crown counsel, with the consent of the presiding Judge, then preferred an indictment against the prisoner for having unlawfully assaulted B., thereby causing him actual bodily harm (Criminal Code, sec. 295), upon which the grand jury found a "true bill." Upon the trial of the prisoner upon this charge, before the Chairman of the Sessions and a jury, the Chairman held that where an assault has been committed resulting in death no charge other than murder or manslaughter will lie against the accused, and withdrew the case from the jury, traversing it to the next Sessions in order to submit a case to the Court, accepting bail for the prisoner in the meantime, and stating for the determination of the Court the question whether he was right in his ruling:—

Held, by the majority of the Court, that the question should be answered in the negative.

It was not for the Chairman to determine whether the assault which the prisoner was alleged to have committed resulted in the death of B.: that was, if a material question, one for the jury.

Per MEREDITH, C.J.O., and MACLAREN, J.A.:—The question asked was properly the subject of a stated case. A conviction for the assault would not bar the right to try the prisoner for murder or manslaughter; and the Crown officers might in their discretion prosecute for the lesser offence.

Per HODGINS, J.A.:—There is no legal restriction upon the power of the Crown in determining as to the particular charge which shall either be preferred or prosecuted against an offender; changed circumstances may dictate the propriety of exercising a discretion which at another time would be inexpedient; the real safeguards in criminal procedure lie in the honour and responsibility of the Crown and in the right of a person not to be twice vexed for the same offence; it is often difficult to determine, in advance and finally, for what crime a person should properly be placed on trial; and it is generally expedient to proceed with a trial upon an indictment before the Court, leaving it to be ascertained afterwards whether the accused is put in peril twice in the same matter if a subsequent charge is preferred. The Court had no power to deal with the question submitted, and the stated case should be quashed.

Per FERGUSON, J.A.:—The Crown not having charged that the assault set forth in the indictment was either the cause or a cause of death, it was not necessary to pass upon the correctness of the legal pro-

position stated by the Chairman. His opinion was based upon an assumption of fact which should have been left to the jury. Sections 1014 to 1018 of the Criminal Code considered in relation to the procedure adopted by the Chairman. Review of the authorities upon the question whether the reserved case was properly before the Court and upon the right to indict for a lesser offence.

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THE following statement of the facts is taken from the judgment of HODGINS, J.A.:—

Reserved case submitted by SNIDER, County Court Judge, sitting as Chairman of the General Sessions of the Peace in and for the County of Wentworth.

The question reserved is stated as follows:—

“I held that where an assault has been committed resulting in death no charge other than murder or manslaughter will lie against the accused, and I accordingly withdrew the case from the jury and traversed the same to the next Sessions in order to submit this case to the Court, accepting bail for the prisoner in the meantime.”

“Was I right in so holding?”

The accused was being tried before the learned Chairman and a jury on a bill of indictment charging him with having unlawfully assaulted Harry Byrnes, thereby causing him actual bodily harm, contrary to the provisions of sec. 295 of the Criminal Code.

The facts as stated in the case by the learned trial Judge are as follows:—

“The evidence disclosed that at the Hamilton Winter Assizes, 1921, an indictment was preferred before the grand jury charging the prisoner and one Louis La Chappelle with the murder of the said Harry Byrnes, and the grand jury were instructed that they might return a true bill either for murder or manslaughter; the grand jury brought in ‘no bill’ against the prisoner Edward Taylor and a ‘true bill’ against the prisoner Louis La Chappelle. The Crown counsel, with the consent of the presiding Judge, then preferred the indictment against this prisoner which came before me in this case, upon which the grand jury brought in a ‘true bill,’ which was traversed to this Court.

“The evidence disclosed that the deceased Harry Byrnes and the prisoner and Louis La Chappelle had an altercation in the street; there was evidence on the part of the Crown that the prisoner struck the deceased on his head with some instrument, the blow bringing the deceased to his knees; almost immediately, and before the deceased had regained his feet, La Chappelle struck the deceased several blows on his head with another instrument; the skull was crushed by blows from the effects of

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which he died within a few hours thereafter, but the medical witness who performed an autopsy on the body of the deceased was unable to distinguish the injury caused by the blow struck by the prisoner from the injuries caused by the blows struck by La Chappelle, or to say what effect the blow struck by the prisoner had."

October 28. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Edward Bayly, K.C., for the Attorney-General for Ontario, argued that the learned Judge below should have gone on with the trial, leaving it to the accused to plead autrefois convict or autrefois acquit to any new indictment. He contended that the Crown may charge a lesser offence although the facts may warrant the charging a greater one: *Regina v. Miles* (1890), 17 Cox C.C. 9, 24 Q.B.D. 423; *Union Colliery Co. v. The Queen* (1900), 31 Can. S.C.R. 81; *Rex v. Shea* (1909), 14 Can. Crim. Cas. 319. The Court may see fit to express an opinion on this point. There was no evidence from which the inference could be drawn that the accused had killed the man who was slain. He referred to secs. 295 and 951 of the Code.

C. W. Bell, K.C., for the prisoner, contended that a man could not be tried for a lesser offence if the offence conducted to the death of the person assaulted: *Regina v. Ganes* (1872), 22 U.C.C.P. 185; *Regina v. Simmonite* (1843), 1 Cox C.C. 30; *Rex v. Forseille* (1920), 55 D.L.R. 262. The learned Judge was right in traversing the case pending the decision of the Appellate Division on the reserved case.

Bayly, K.C., in reply.

December 27. HODGINS, J.A. (after stating the facts as above):—It is quite open on the evidence, as stated in the case, to assume that the grand jury, when the indictment for murder was before them, arrived at the conclusion that the blow struck by the accused did not cause or contribute to the death, but that it was La Chappelle's assault which really killed Byrnes, and that in consequence they could—and did—ignore the bill.

The present indictment is for the assault committed on Byrnes before La Chappelle struck him, which undoubtedly did cause actual bodily harm.

I think the procedure adopted by the learned County Court Judge, sitting in the General Sessions, was not that which he was entitled to take.

The provisions of the Criminal Code regarding a reserved case (secs. 1014 to 1018) clearly indicate that the trial is not

to be retarded or interfered with by the granting or the refusing of a stated case: indeed, they provide in imperative terms that after a question is reserved "the trial shall proceed as in other cases" (sec. 1014 (4)). To stop the trial, discharge the jury, and traverse the case to the next Sessions, and at the same time to reserve a case to this Court, was, in my judgment, to adopt a practice wholly at variance with the Code. It would open the door for stating cases upon the admission or rejection of evidence, etc., during a criminal trial and also for adjourning the trial till the reserved case had been decided. This, after the accused has been given in charge, is improper. The jury must either be discharged or the trial must go on. If the former course is adopted, it puts an end to the trial, and so there is no proceeding during which a case can be reserved. Besides this, if we should answer upon the question before us that the indictment was proper, how can this Court exercise the powers given by sec. 1018 and what power has the Judge to admit to bail under sec. 1014 (5) pending the hearing of the case?

If the evidence upon an indictment for a crime indicates that the accused is guilty of a greater crime, then I conceive that it is the right of the trial Judge to discharge the jury and direct a new indictment to be preferred, or, if that is beyond his jurisdiction, to remand the accused into custody until the Crown has decided what course shall be taken. The trial Judge can, however, proceed with the trial, leaving it to the accused to plead *autrefois* convict or *autrefois* acquit to any new indictment, or he may reserve a case while the accused is still on trial. Any of these courses is dictated by justice—both to the Crown and the accused.

The last-mentioned is the one preferred by Denman, J., in *Regina v. Tancock* (1876), 13 Cox C.C. 217. The prisoner was tried for the manslaughter of A., found guilty and sentenced. Shortly after his trial, the coroner's jury returned an inquisition for wilful murder upon the same facts. At the next assizes the prisoner was arraigned upon such inquisition, when he pleaded *autrefois* convict. The facts of identity of the prisoner and deceased were given in evidence, and Denman, J., said:—

"If I thought, on the depositions, that this was a case in which there had been an act committed which was probably murder, and which the jury would probably so think, I should reserve the point for the Court for Crown Cases Reserved and try the prisoner for murder; but, after carefully reading the depositions and consulting with the Lord Chief Baron, my

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opinion is very strong indeed that to expect a verdict of murder would be idle; and if there were one, I should have to report against the conviction. That being so, the prisoner would then practically be tried again on the same facts for the same offence, which is abhorrent to the law of England. I shall therefore rule to the jury that I think this plea proved, and that they ought to find the issue in favour of the prisoner."

The difficulty arising from the course taken by the learned trial Judge, instead of disposing of the case before him, leaving it to the accused, if subsequently indicted, to plead autrefois convict or acquit, is well put by Lord Denman, C.J., in *Regina v. Button* (1848), 3 Cox C.C. 229. It was there decided that "upon an indictment for misdemeanour it is no ground for an acquittal that the evidence necessary to prove the misdemeanour also shews that it is part of a felony, and that the felony has been completed. Thus upon an indictment for a conspiracy to commit larceny, and charging that in pursuance of that conspiracy the larceny had been committed, the defendant is not entitled to an acquittal, though the evidence proves that he was guilty of felony, the conspiracy proved making him an accessory before the fact to the crime of larceny."

In discussing the case during the argument, Lord Denman asks (p. 232):—

"If indicted for a conspiracy, is the defendant to purge himself by committing a felony?" Counsel answers: "That must be contended if the conspiracy in this instance is to be held to be merged." Lord Denman asks: "What would be the form of application to prevent the conviction? Is it a matter for the jury who are empanelled to decide aye or no whether a particular offence has been committed, that another offence of a higher nature has been committed?"

In giving judgment, he said, after discussing the cases upon the subject (p. 240):—

"It was further urged for the defendants, that, unless this defence was sustained, they might be twice punished for the same offence. But this is not so; the two offences being different in the eye of the law. If, however, a prosecution for a larceny should occur after a conviction for a conspiracy, it would be the duty of the Court to apportion the sentence for the felony with reference to such former conviction. If the position contended for by the defendants was true, its application would be subject to much uncertainty; for it is not within the province of the Judge, in general, to decide on the credibility of the witnesses, or the weight of the facts tending to prove a felony; but ac-

cording to the present contention, the duty of acquitting, on his own opinion, is cast upon him; and this conclusion of fact, in which probably the jury would not have concurred, is to be subject to no review. Also, if he should be satisfied that a felony is proved, and should direct an acquittal of the misdemeanour, it is obviously uncertain whether the same evidence would be given upon a prosecution for felony, or would be satisfactory to the jury, or would be left without answer. The felony may be pretended to extinguish the misdemeanour, and then may be shewn to be but a false pretence; and entire impunity has sometimes been obtained, by varying the description of the offence according to the prisoner's interest; and he has been liberated on both charges solely because he was guilty upon both. Upon this review, we are of opinion that this conviction for a misdemeanour ought to be sustained, although the evidence proving it proved also that it was part of a felony, and that such felony had been completed."

The same view has been taken in this Province. In *Regina v. Doty* (1894), 25 O.R. 362, a prisoner indicted and tried for the offence of having seduced a girl under 16 was held to have been properly convicted of such offence, although the evidence given, if believed in whole, would have supported a conviction for rape, an indictment for which he had been previously ignored by the grand jury. Boyd, C., considered that the jury, while giving credit to the girl's evidence in the main, did not accept her statement so far as related to violence—a course perfectly competent for them to take. Meredith, J., said that, "had there been evidence of the other, and entirely different, offence only, the trial Judge would doubtless have directed an acquittal upon this indictment, and have made an order under which another indictment for the offence proved, would have been prepared." He agreed that the jury might believe only part of the evidence if they so chose.

The *Doty* case follows *Regina v. Neale* (1884), 1 C. & K. 591, the decision in which is also stated in *Regina v. Button*, 3 Cox C.C. 229, to be a direct adjudication that a misdemeanour which is part of a felony may be prosecuted as a misdemeanour though the felony has been completed. I refer also to the remarks of Osler, J.A., in *Miller v. Lea* (1898), 25 A.R. 428.

There is, too, in the statement of the learned trial Judge here an assumption which rather usurps the function of the jury. The point is whether this particular assault caused death to result. This question has never been tried: the grand jury has taken the view that the accused was not guilty of murder, and only a petit jury, at a regular trial, can determine the point

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to be settled in regard to the present indictment. It must however be admitted that the relation of an assault to the death in the case of murder following violence sometimes raises a question of considerable difficulty. This is illustrated by the case of *Regina v. Bird* (1851), 5 Cox C.C. 20, where the crime of murder was charged as having been caused by several assaults committed by the prisoners, the evidence shewing the commission of these assaults, but failing to connect them with death as its cause. The point debated was whether, under the statute 1 Vict. ch. 85, sec. 11, which enabled the jury on an indictment for murder or manslaughter to acquit for the felony and to convict for an assault, a conviction was proper where the assault was not shewn to have conduced to the death. The case was very fully argued and was considered by fourteen Judges, who, by a majority, decided that the prisoners could not have been lawfully convicted of an assault on that indictment under the circumstances above named, inasmuch as the assault contemplated by the statute must be such that it was a part of the very act and transaction prosecuted and also conduced to the death. They also held that the prisoners were liable to punishment upon a subsequent indictment for those assaults.

This case was considered and followed several times in this Province. In *Regina v. Dingman* (1863), 22 U.C.R. 283, it was held that under C.S.C. ch. 99, sec. 66 (similar to the English statute), there could be no conviction for an assault unless the indictment charged an assault in terms, or a felony necessarily including it, which manslaughter was not.

In *Regina v. Ganes*, 22 U.C.C.P. 185, the Court decided, following *Regina v. Bird*, that on an indictment for murder the prisoner could not be convicted of an assault under 32 & 33 Vict. ch. 29, sec. 5, which was similar in terms to the English statute. Hagarty, C.J.: "I have arrived at the conclusion that we must decide this case on the authority of *Regina v. Bird*, and that the prisoners here could not have been convicted, on this indictment, of any assault not conducing to the death. . . . The question in *Bird's* case was whether, assuming that there could be a verdict for assault on an indictment for murder, the assault must have been conducive to the death . . . therefore the jury should have been directed that they could only convict of some assault conducing to the death." Gwynne, J.: "The true rule, as it appears to me, to be deduced from *Regina v. Bird*, and the one best calculated to ensure an efficient administration of justice in such cases, is, that inasmuch as the only assaults which are included in the crime charged, in an indictment for

murder or manslaughter, are those which conduce to the death, these are the only ones which are material to the issue and involved in it; and if the accused be found guilty of such assaults, or of any one conducing to the death, then he is guilty of homicide either in the degree of murder or manslaughter . . . The logical conclusion to be deduced from the decision appears to me to be shortly this, that if the prisoner is guilty of an assault which has conduced to the death, he is guilty of felony, and cannot in respect of that assault be convicted of assault merely; and if the assault proved does not conduce to the death, it is distinct from and independent thereof, and is therefore not included in the crime charged, and is dehors the indictment; and therefore no verdict of assault can be rendered upon an indictment for homicide, in respect of such an assault."

Regina v. Smith (1874), 34 U.C.R. 552: "On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32 & 33 Vict. ch. 29, sec. 51, cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault." Richards, C.J. (p. 554): "I think all the Judges there" (referring to *Regina v. Bird*) "concur that to convict of an assault, when the indictment is for felony, the indictment must be for a felony which necessarily includes an assault. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must of necessity include an assault."

In view of the above considerations, I am of opinion that what the learned Judge has assumed must be tested by the facts actually proved in regard to the assault. It is not a matter that can be decided in advance on a point of law. It depends wholly upon whether the assault did or did not conduce to the death, and that a jury must try. For this reason, as well as those already considered, I am of opinion that the reserved case is not properly before us.

It is consequently unnecessary to determine the larger point argued, as to the right generally to indict for a lesser instead of a greater offence, yet, as it was argued before us, and the Crown has invited us to express an opinion as to it, I have no objection to stating my views for what they are worth.

Ample provision is made in the Criminal Code for the laying of informations and the presentation of indictments. Any one can put the law in motion: Russell on Crimes, 7th ed., p. 1923; *Rex v. St. Louis* (1897), 1 Can. Crim. Cas. 141; and see secs. 654, 668, 871, 872 of the Code. When that is done, the conduct of the prosecution is practically in the hands of the Crown,

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which in this Province assumes the responsibility for the punishment of criminal offenders. There is no provision restricting the power of the Crown to lay information for any description of crime which the facts warrant, nor is there anything circumscribing the discretion of the Crown as to the degree of crime for which it shall determine to prosecute. Public opinion and a sense of duty can be counted on, and is in practice relied on, to correct any tendency not to enforce the law to the fullest extent. There is, no doubt, at present, a desire to prosecute owners and drivers of automobiles where death has been caused for a lesser offence than manslaughter so as to secure conviction and punishment. This tendency may be dangerous from a public point of view, but the Crown must fairly weigh the moral and practical effect of such a course. Miscarriage of justice is, however, rare, and, in the words of Hawkins, J., in *Regina v. Miles* (1890), 17 Cox C.C. 9, 20, "no system of judicature can be suggested in which occasionally failure to ensure complete justice may not arise."

Conditions have previously arisen, due to treason, riot, disorder, or the persistent occurrence of a particular offence, which have caused the laying of informations appropriate to the time as well as the offence. There are only a few instances in which the Code or the common law interferes with the practice of the Crown or prescribes the course to be pursued even to the extent of empowering the jury to convict for a crime not actually charged in the indictment. Section 732, sub-sec. 2, for example, requires a Justice to refrain from convicting for an assault if the assault was accompanied by an attempt to commit some other indictable offence, or, if the case was one for indictment, to limit himself to inquiry and committal. See also secs. 950, 951, 952, 953, 954. There are other provisions which deal with another aspect, namely, the effect of a conviction or acquittal for a greater or lesser offence in determining whether or not the offence has been substantially dealt with in the prior proceedings (secs. 907, 908, 909, 950 (2)). It is the maxim which lies at the base of the plea of *autrefois* convict or acquit that securely safeguards those accused and the public from over-zeal on the one hand or laxity on the other. It requires the firm ground of actual facts and of transactions in open court, in place of opinion, and in no way ties the hands of the Crown, while affording full protection to any one who finds himself in peril for a second time for the same offence.

Discussing the cases cited in the argument, the *Ganes* case has already been mentioned. In *Rex v. Shea*, 14 Can. Crim. Cas. 319, a decision by Wallace, County Court Judge (Nova Scotia),

there had been an acquittal on a charge of manslaughter, while here the grand jury have returned "no bill." This is of course no bar to a subsequent indictment for the same offence (see *Regina v. Simmonite*, 1 Cox C.C. 30). In the *Shea* case, Wallace, Co.C.J., says:—

"The real question is whether on the sole charge of manslaughter, in the form which was used in the case pleaded" ("did kill and slay"), "a defendant can be convicted of a lesser offence" (i.e., of inflicting bodily harm, based on the same circumstances, occurring on the same day), "as, if so, the defendant having been once in legal peril in respect to the lesser offence cannot again be placed in peril.

"At common law a defendant when charged with manslaughter could not, on that charge, have been convicted of a lesser offence: *Regina v. McGrath* (1867), 26 U.C.R. 385. Subsequently a statute was passed in England empowering the Court on a trial for manslaughter to convict for the lesser offence of an assault. There is no similar provision in the Canadian Code.

"It is contended that sec. 951 of the Code has the same effect as the English statute. Such a construction, however, cannot be given to that section, where manslaughter has been charged, and I therefore hold that the plea of autrefois acquit, set up on behalf of the accused, has not been established, and that the accused must stand his trial on the lesser charge."

This case is opposed to the decision of the Saskatchewan Court of Appeal in the later case of *Rex v. Forseille*, 55 D.L.R. 262. The accused was tried on a charge containing two counts, for manslaughter and for causing grievous bodily harm by an unlawful act. Held, that the second count should not have been allowed to go to the jury. The jury having found him not guilty of manslaughter he could not be convicted on the second count. Haultain, C.J.S., says: "If he was guilty of doing grievous bodily harm which resulted in immediate death, he was guilty of manslaughter. The jury found him not guilty of manslaughter, and that finding takes away all possible ground upon which a verdict of guilty on the second count could be based."

This is because grievous bodily harm may result in death or may not. If it does cause death, then clearly the offence becomes identical with manslaughter.

The question involved in these two cases and in the present case is one of some nicety.

The rule laid down by Cockburn, C.J., in *Regina v. Elrington*

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(1861), 1 B. & S. 688, is thus stated (p. 696): "We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

This is said by Pollock, B., in *Regina v. Miles*, 17 Cox C.C. 9, 22, 24 Q.B.D. 423, 436, to be "not only the law, but it is consonant with sound sense and the just treatment of defendants."

Explanations of this rule are pointed out in various cases. In the *Miles* case, Hawkins, J., says (17 Cox C.C. at p. 20) that a previous conviction for common assault could not be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. "For the offence of murder consists in felonious killing." He explains the difficulties which have arisen in the application of the rule (autrefois convict) as having most frequently occurred in cases where conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and states the rule, as deducible from the numerous cases to be found on the subject, to be this: "that where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that *the committal of the offence was followed by serious consequences*" (pp. 18, 19). The Court was composed of Lord Coleridge, C.J., Hawkins, J., Pollock, B., Charles, J., and Grantham, J.

In *Rex v. Salvi* (1857), 10 Cox C.C. 481 (note), Pollock, C.B., on a charge of murder, where the prisoner had been previously acquitted on a charge of wounding with intent to murder, said: "A party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill, nay, by evidence that might clearly shew he meant to stop short of death, and even took some means to prevent death, but if that illegal act of his produces death, that is murder." Martin, B., said: "The offence for which the prisoner has been tried was one of intent, and was therefore complete the moment the stab was given, whereas the

offence for which he was now indicted could only be consummated by the death of the party." The Court held that the plea was no bar to the charge of murder, and the prisoner was found by the jury guilty of manslaughter.

The case of *Regina v. Gilmore* (1882), 15 Cox C.C. 85, deals with a like distinction.

So a new offence arises when death occurs after an assault: *Regina v. Morris* (1867), 10 Cox C.C. 480; *Regina v. Friel* (1891), 17 Cox C.C. 325; *Rex v. Tonks*, [1916] 1 K.B. 443.

In *Union Colliery Co. v. The Queen*, 31 Can. S.C.R. 81, the offence charged was punishable under the Criminal Code, sec. 213. Sedgewick, J., in giving judgment, pointed out the difference between what was charged and the crime of manslaughter, in these words (p. 90): "It is possible that the facts alleged in the indictment" ("the company unlawfully neglected . . . to take reasonable precautions," etc., "in maintaining the . . . bridge . . . thereby causing the death of," etc.) "would be sufficient to sustain an indictment for manslaughter against an individual, but the offence alleged in the indictment here is not the manslaughter; it is criminal negligence in the discharge of duty. The killing is not alleged as the offence, but merely the consequence of the offence."

This case may be compared with *Regina v. Friel*, 17 Cox C.C. 325, where Williams, J., pointed out that in cases of manslaughter, where the charge is based on death resulting from culpable negligence, there is no criminal offence unless death ensues and gives rise to a charge of manslaughter.

The conclusion I have come to, from considering the foregoing cases and others, is that there is no legal restriction upon the power of the Crown in determining as to the particular charge which shall either be preferred or prosecuted against an offender; that changed circumstances may dictate the propriety of exercising a discretion which at another time would be inexpedient; that the real safeguards in criminal procedure lie in the honour and responsibility of the Crown and in the right of a person not to be twice vexed for the same offence; and that it is often an extremely difficult matter to determine, in advance and finally, for what crime a person should properly be placed on trial. It is, I think, generally expedient to proceed with a trial upon an indictment before the Court, leaving it to be ascertained afterwards whether the accused is put in peril twice in the same matter if a subsequent charge is preferred.

In the result, I think the Court has no power to deal with

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the question submitted, and that the reserved case should be quashed.

There should be no costs.

MEREDITH, C.J.O.:—I have had the opportunity of reading the opinion of my brother Hodgins, in which the material facts are set out.

I have doubts as to the correctness of my learned brother's view as to the power of the Judge of the Court below to ask the opinion of this Court on the case he has stated. It is not, however, necessary to determine that question.

It is clear that it was not for the learned Judge to determine whether the assault which the accused is alleged to have committed resulted in the death of the person assaulted: that was, if a material question, one for the jury; and, therefore, if the question asked were properly asked, our answer to it would be in the negative. The proper course to have been taken would have been to have let the case go to the jury with a direction as to the law, which, holding the view which the learned Judge held, would have been that if the finding were that death resulted from the assault the accused should be acquitted. Such an expression from this Court would, though it were not proper, for the reasons given by my brother Hodgins, to give a formal answer to the question asked, doubtless be a guide in dealing with the case hereafter if the adjourned trial should take place.

I am inclined to think that the question asked is properly the subject of a stated case. It involves really two questions: (1) whether if it be proved that death resulted from the assault the prisoner should be acquitted; and (2) was the course taken by the learned Judge in deciding that question of fact right?

While the learned Judge erred in the course he took at the trial, and in not adopting what, I have said, would have been the proper course, it does not follow that he had no authority to state the case.

Section 1014 of the Criminal Code contains the provisions as to reserving questions of law for the opinion of the Court. Subsection 2 provides that any question of law arising on the trial . . . may be reserved either during or after the trial. And subsection 4 provides that after a question is reserved the trial shall proceed as in other cases.

I do not think that the fact that the provision of subsec. 4 was not followed affects the right to reserve questions of law which, as in this case, were reserved before the trial was adjourned. There was, when the decision to reserve was made, as it were a vested right to the reservation, which was not, I

think, affected by the failure to observe the direction of subsec. 4. App. Div.

Mr. Bayly pressed upon us the desirability of our deciding whether the view of the learned Judge of the Court below was right, and I see no reason why we should not express our opinion as to it.

It has been held that a summary conviction for assault is not a bar to a subsequent indictment for manslaughter upon the death of the person assaulted consequent upon the same assault, and that decision was reached notwithstanding the statutory provision that if any person against whom a complaint of assault shall have been made by or on behalf of the party aggrieved, having been convicted, shall have suffered the imprisonment awarded, "he shall be released from all further or other proceedings civil or criminal for the same cause."

The cases to which I refer are *Regina v. Morris* (1867), L.R. 1 C.C.R. 90; *Regina v. Friel*, 17 Cox C.C. 325; *Regina v. Miles*, 24 Q.B.D. 423.

It is an *â fortiori* case that where, as in the case at bar, no such statutory provision applies, a conviction for the assault would form no bar to a prosecution for manslaughter or murder. The reasons for that are clearly stated in the cases referred to.

If, then, a conviction for the assault charged in the case at bar would not bar the right to try the prisoner for murder or manslaughter, it follows, I think, that the Crown officers may in their discretion prosecute for the lesser offence.

In the *Miles* case the conviction was quashed, but only on the ground that the prisoner had been previously convicted for the same assault with which he was then charged, and it was pointed out that a conviction for assault would not be a bar to an indictment for murder, because that was a different offence, consisting of feloniously killing, nor would a conviction for assault bar a subsequent prosecution for rape. See the observations of Hawkins, J., 24 Q.B.D. at pp. 434, 435.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., agreed that the question should be answered in the negative.

FERGUSON, J.A.:—I agree in the result, but express no opinion on the proposition of law stated by the learned trial Judge.

I am of opinion that in this case it is not yet necessary to pass upon the correctness of the legal proposition stated.

The Crown has not charged that the assault set forth in the

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indictment was either the cause of death or a cause of death.

Therefore, unless or until it is admitted or found by the jury that the assault was at least a contributing cause of death, it was, in my opinion, improper for the trial Judge to withdraw the case from the jury—for it seems to me that until the jury found or the Crown admitted that the assault charged was a cause of the death it was unnecessary to consider the question raised by the trial Judge.

The question may never arise in the case, for the jury may find that the prisoner is not guilty of any assault, or that he committed an assault which did not cause death or contribute thereto.

These were questions for the jury, which the learned trial Judge should have permitted them to pass upon.

The opinion of the learned trial Judge is based upon an assumption of fact which should have been left to the jury.

Though the opinion of the trial Judge is in accord with what appears to me to have been the general practice and the opinion of the Appellate Division of the Supreme Court of Saskatchewan in *Rex v. Forseille*, 55 D.L.R. 262, the time to apply it had not arrived when he did so—and consequently the time has not arrived for us to determine the correctness of his proposition, from which it follows that any opinion we now express cannot be taken as determining the question. In these circumstances I think it is better to express no opinion.

Question answered in the negative.

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Ontario Temperance Act—Magistrate's Order for Confiscation of Intoxicating Liquor—Motion to Quash—Sec. 70 (9) of Act—Existence of Conditions Mentioned therein—Intention to Contravene Act—Primâ Facie Case—Evidence—Finding of Magistrate—Power of Court to Review—Shipment of Liquor from Place outside Ontario through Ontario to Place outside of Ontario—Secs. 43 and 139 of Act—Burden of Proof—Powers of Provincial Legislature—Liquor Shipped to Place in Ontario—Intention to Reship.

The order of KELLY, J., *ante* 1, quashing an order made by a Police Magistrate, under sec. 70 (9) of the Ontario Temperance Act, directing the confiscation of a quantity of intoxicating liquor, was reversed (FERGUSON, J.A., dissenting).

Held, that, as the conditions mentioned in sec. 70 (9) existed, there was "*primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of this Act."

Whether the liquor was being transported "through Ontario from a place outside of it to another place outside of it" (secs. 43 and 139) was a question of fact to be decided by the magistrate; there was evidence to support his finding; and the Court cannot look behind the magistrate's conviction or order except to see whether there was any evidence to support it, and cannot therefore weigh the evidence or pass upon it.

Per MEREDITH, C.J.O.:—The fact that the liquor was shipped from the Province of Quebec to a place in Ontario, and not directly to a place outside of Ontario, was alone sufficient to cast upon the defendant the onus of proving that the intention was to reship it to a place outside the Province.

The quashing of a conviction or order and the setting aside of a verdict do not stand upon the same footing.

Views expressed in *Rex v. Lemaire* (1920), 48 O.L.R. 475, 479, and *Rex v. Mooney* (1921), 49 O.L.R. 274, dissented from.

Assuming that the onus was in the first place upon the Crown, there was such evidence as shifted the burden to the defendant.

Ex p. Cunningham (1884), 13 Q.B.D. 418, and *Ex p. Barne* (1886), 16 Q.B.D. 522, distinguished.

Per MAGEE, J.A.:—*Quere*, whether in a transaction over which the Province has no jurisdiction the Legislature could declare any state of facts to be *primâ facie* evidence or alter the rules of evidence. But, apart from the statute, there was in the circumstances themselves sufficient *primâ facie* evidence that the shipment was intended only as an import into Ontario for an illegal purpose—and the magistrate was not satisfied with the answer to it.

Per HODGINS, J.A.:—The proof that the transaction was a *bonâ fide* one between two persons, one in this Province and one outside of it, depended upon the testimony of the defendant. The magistrate discredited that testimony; and, in face of that and the fact that the transaction, upon his testimony, was confined to the defendant himself, acting under different names, sec. 139 did not assist him.

Per FERGUSON, J.A.:—The question of shipment and transit from the Province of Quebec to another place outside of Ontario being raised, it was necessary for the Crown to prove that the liquor was within the purview and ambit of the Act—the legislative jurisdiction of the Province—by establishing that the liquor was not being trans-

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ported through Ontario from a point outside of the Province to a destination outside of the Province; and, unless and until that question was determined adversely to the defendant, the magistrate had no right or power to rely upon or call to his assistance sec. 70 (9).

In the circumstances, the Court was entitled to review the evidence, not merely to satisfy itself that there was or was not evidence on which the magistrate might have made the finding necessary to support his order, but to satisfy itself that he acted on such evidence, and that the course of justice was not in any way impeded by bias, prejudice, fraud, or erroneous view of the law.

Rex v. Nat Bell Liquors Limited, 35 Can. Crim. Cas. 44, 83, 56 D.L.R. 523, referred to.

AN appeal by the Attorney-General for Ontario from an order of KELLY, J., *ante* 1, quashing an order of one of the Police Magistrate for the City of Toronto directing the confiscation of intoxicating liquors.

November 8. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Edward Bayly, K.C., and *F. P. Brennan*, for the appellant.

James Haverson, K.C., and *R. H. Greer*, K.C., for the defendant, respondent.

The arguments of counsel and the authorities cited are set out in the judgments.

December 27. MEREDITH, C.J.O.:—This is an appeal by the Attorney-General for Ontario from an order of Kelly, J., dated the 13th July, 1921, setting aside an order of the Police Magistrate for the City of Toronto (Denison) made on the 8th February, 1921, for the confiscation of liquor.

As the law stood when the transaction in question took place, it was provided by sec. 70 of the Ontario Temperance Act (6 Geo. V. ch. 50) that (sec. 70, subsec. 1): "Where an inspector, policeman, constable or officer finds liquor in transit or in course of delivery upon the premises of any railway company, or at any wharf, railway station, express office, warehouse or other place, and believes that such liquor is to be sold or kept for sale or otherwise in contravention of this Act, he may forthwith seize and remove the same together with the package or packages in which such liquor is contained;" and provision is made by the following subsections for the procedure leading up to an order for the forfeiture of the liquor to His Majesty "to be destroyed or otherwise dealt with in such manner as the Minister may direct;" this order is to be made "if the Justice . . . finds

that it was intended that such liquor was to be sold or kept for sale or otherwise in contravention of this Act" (subsec. 7).

Subsection 9 provides that, "If it appears to the Justice that such liquor or any part of it was consigned to some person in a fictitious name or was shipped as other goods, or was covered or concealed in such a manner as would probably render discovery of the nature of the contents of the vessel, cask or package in which the same was contained more difficult, it shall be *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of this Act."

The Act also contains provisions as to the prohibitory sections of it not being applicable to shipments through Ontario from and to points out of the Province.

The first of these is sec. 43, which provides that nothing in sec. 40—the main prohibitory section—"shall prevent common carriers or other persons from carrying or conveying liquor . . . through Ontario from a place outside of it to another place outside of it."

The other provision is sec. 139, which is as follows:—

"While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Ontario, except under license or as otherwise specially provided by this Act, and to restrict the consumption of liquor within the limits of the Province of Ontario, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Ontario and a person in another Province or in a foreign country, and the provisions of the Act shall be construed accordingly."

That the conditions mentioned in subsec. 9 of sec. 70 existed is beyond question: the liquor was shipped as lath, and was consigned under a fictitious name at Montreal to a fictitious name in Toronto, and it was covered and concealed in such a manner as would probably render discovery of the nature of the contents of the vessel in which it was contained more difficult.

There was, therefore, *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of this Act.

It was argued by counsel for the respondent that the liquor was purchased by him in Montreal, and was intended to be transported through Ontario to Cleveland, Ohio, where he resided, and that his reason for shipping to Toronto was that he thought that the authorities in Cleveland would be less likely to suspect that the car in which the liquor was being transported contained liquor if it had come from Ontario than if it

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came from Montreal, and that it was always his intention, when the car reached Toronto, to re-bill the car in which the liquor was, at once, to Cleveland, and that he had in fact so re-billed it before the seizure was made.

It was, in my opinion, a question of fact to be decided by the Police Magistrate whether the liquor was being transported in the manner mentioned in sec. 43 or sec. 139.

The adjudication of the Police Magistrate was, according to the order for the confiscation of the liquor, "that a quantity of liquor in transit, to wit, 397 cases of Green River whisky seized in pursuance of section 70 of the Ontario Temperance Act on the 25th day of December, 1920, at Parkdale station, in the said city of Toronto, of which Rideau Lumber Company appeared to be the consignee or owner, was intended to be sold or kept for sale in contravention of the provisions of the said Act."

That is a finding of fact, and the only question for us is, was there any evidence to support it? There undoubtedly was such evidence, for subsec. 9 of sec. 70 makes the existence of such conditions as existed in this case *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of the Act. That *primâ facie* case could, of course, be met by the respondent proving that it was not so intended or that it came within the exceptions mentioned in sec. 43 or sec. 139. This he attempted to do, but must have failed to satisfy the Police Magistrate of that, else the adjudication that was made could not have been made. In addition to this *primâ facie* case, there was also the fact that the liquor was not shipped from Montreal to a place outside of the Province, but to Toronto, and that fact alone, in my opinion, cast upon the respondent the onus of proving that the intention was what he alleges it to have been.

It has been settled by a long line of decisions that upon a motion to quash the Court cannot look behind the conviction except to see whether there was any evidence to support it, and cannot, therefore, weigh the evidence or pass upon it.

There are some observations of the Chief Justice of the Common Pleas in *Rex v. Lemaire* (1920), 48 O.L.R. 475, 479, which seem to indicate that the quashing of a conviction and the setting aside of a verdict stand upon the same footing. I am unable to agree with that view, and it is, in my judgment, opposed to the well-settled rule established by a long line of decisions. I am also unable, for the same reason, to agree with what was said by Middleton, J., in *Rex v. Mooney* (1921), 49

O.L.R. 274, if indeed he intended to do more than follow *Rex v. Lemaire*.

I do not mean to say that where there is but a scintilla of evidence to support it the conviction may not be quashed, but as to that it is unnecessary to express an opinion. There was in this case ample evidence of a breach of the Act, and, therefore, to justify the making of the order, which could have been met by the respondent proving that the case came within the exceptions in sec. 43 or sec. 139, and of that, as I have said, he failed to satisfy the Police Magistrate.

Such cases as *Ex p. Cunningham* (1884), 13 Q.B.D. 418, and *Ex p. Barne* (1886), 16 Q.B.D. 522, are distinguishable.

In the former case the question arose under the Bankruptcy Act, 1883; sec. 6 (1) of which provided that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England;" and it was held that the onus was on the petitioning creditor to shew that the debtor was "domiciled" in England. Stating his opinion Baggallay, L.J., said (p. 421): "I can quite conceive that there may be cases in which there is such an amount of *primâ facie* evidence of an English domicile as to shift the burden on to the respondent." Cotton, L.J., uses language to the same effect (p. 423).

In the case at bar, assuming that the onus was in the first place on the Crown, there was, in my opinion, such evidence as shifted the burden on to the respondent. I refer to the fact that the shipment was to Toronto, and that the conditions mentioned in sec. 70 (9) existed.

In *Ex p. Barne* it was held that the Court was bound by the decision in the *Cunningham* case, of which it also approved, but the rule enunciated by Lord Justice Baggallay as to the shifting of the burden of proof was also recognised and acted upon.

I am not satisfied that such cases as *Ex p. Cunningham* and *Ex p. Barne* have any application to a case such as this. There the question was one as to the jurisdiction of the Court, here the question is as to whether or not there had been a contravention of the Act. I am inclined to think that the provisions of secs. 43 and 139 are in the nature of exceptions, and that the onus of proving that the case came within them rests upon the person charged. See *Rex v. James*, [1902] 1 K.B. 540; *Rex v. Audley*, [1907] 1 K.B. 383; and *London and North Western R.W. Co.*

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v. *J. P. Ashton and Co.*, [1920] A.C. 84. See also the Summary Convictions Act, sec. 5 (R.S.O. 1914, ch. 90).

In *Rex v. Waller* (1921), 34 Can. Crim. Cas. 312, 60 D.L.R. 557, a decision of the Saskatchewan Court of Appeal, in a case arising on somewhat similar provisions to those contained in the Ontario Act, the analogous provision was treated as an exception, and, as I understand the report of the case, the defendant was held to have brought himself within the exception.

If there had not been the provisions of secs. 43 and 139, a *bonâ fide* transaction such as mentioned in sec. 139, and a shipment such as is mentioned in sec. 43, would not have been affected by the Act. If there had been no such provisions, I cannot doubt that if the liquor were shipped into the Province the onus would rest upon the person charged with a breach of the Act to prove that the liquor was only in transit through this Province from one place outside the Province to another outside of it, and I see no reason why the result should be different because these provisions were inserted in the Act to guard against its being intended to interfere with matters as to which the Legislature had no jurisdiction to legislate.

I have grave doubts whether a shipment such as was made, that is, from Montreal to Toronto, with the intention of re-shipping from that point to Cleveland, is within the exceptions, but it is unnecessary to determine that question.

I would, for the reasons I have given, allow the appeal with costs, and reverse the order of my brother Kelly.

If, as was argued by counsel for the respondent, the Police Magistrate's view was that, on the assumption that it was always intended to reship it to Cleveland, inasmuch as the intention was to smuggle the liquor into the United States, the shipment could not be brought within the exception, his view was, I think, erroneous, but there is nothing to shew that the magistrate so thought or acted upon that view in making his adjudication. The case is one, however, in which it would be well for the provincial authorities to consider whether the respondent should not be afforded an opportunity of satisfying them that there was never any intention of doing otherwise than sending the liquor through this Province to Cleveland, although it is difficult to see what use it can be put to, now that, owing to the publicity the shipment has obtained through the proceedings that have been taken, its entry into the United States has been in all probability rendered impossible.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—I agree with the reasons and conclusions of my Lord the Chief Justice, and only desire to say that, although the Police Magistrate appears to have acted upon the declaration in the provincial statute as to what would be *primâ facie* evidence, yet he fully recognised that it was only *primâ facie* evidence and was rebuttable; and, seeing and hearing the witnesses called to rebut it, he declined to give sufficient credence to their evidence to hold that a *primâ facie* case was displaced. It may be questioned whether in a transaction over which the Province has no jurisdiction the Legislature could declare any state of facts to be *primâ facie* evidence or alter the rules of evidence. But, quite apart from the statute, there was in the circumstances; themselves sufficient *primâ facie* evidence that the shipment was intended only as an import into Ontario for an illegal purpose—and the Police Magistrate was not satisfied with the answer to it.

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HODGINS, J.A.:—Owing to the way in which the learned magistrate expressed his decision, it is not possible to point to any actual finding that the case did not come within sec. 139 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

But it must, of necessity, as it seems to me, have been included in his decision.

That section expresses the constitutional situation when it says that it is not intended by the Ontario Temperance Act “to affect *bonâ fide* transactions in liquor between a person in the Province of Ontario and a person in . . . a foreign country.”

The proof that this transaction was a *bonâ fide* one between two persons, one in this Province and one in the United States of America, depends upon the testimony of the accused, the sole evidence outside of his statements being that McKeown, chief biller of the Canadian Pacific Railway. He says that the accused, about 9.30 a.m. on the 28th December, came in and wanted the car to go to Cleveland, and that he made out a blank bill of lading for Cleveland, U.S.A., and gave it to the accused, who went away, and when he returned and paid the charges the car had been seized. The evidence of the accused that he was the owner of the liquor, that he was the Rideau Lumber Company, the consignee, a fictitious name, and that the honest or real part of the transaction was “getting this from Montreal to Cleveland,” was disbelieved by the magistrate, in view of the admissions of the accused’s counsel and the fraud in the manner of loading and describing the car and its contents, and his deceit in obtaining the United States import papers.

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In face of the discrediting of the accused's evidence, upon which alone the *bona fides* of the transaction depends, coupled with the fact that the transaction, upon his testimony, was confined to himself acting under different names, I am unable to see how sec. 139 can be called in to assist him.

The undisputed and admitted facts bring the case exactly within the provisions of sec. 70, subsec. 9, in every particular, and in themselves completely negative the idea that the transaction in question was a *bonâ fide* one such as sec. 139 contemplates.

I think the appeal must succeed.

FERGUSON, J.A.:—Appeal by the Attorney-General from an order of Kelly, J., dated the 13th July, whereby he set aside an order of G. T. Denison, Esquire, Police Magistrate for the City of Toronto, dated the 8th February, declaring 397 cases of Green River whisky seized under sec. 70 of the Ontario Temperance Act forfeited to His Majesty.

When called upon to shew cause why the liquor seized should not be forfeited, the defendant set up that at the time of seizure the liquor was in the hands of a common carrier in course of transit from a point outside of Ontario to a destination outside of Ontario, that is, from Montreal, Quebec, to Cleveland, Ohio, and was not being kept for sale in Ontario, contrary to the Ontario Temperance Act, 6 Geo. V. ch. 50.

All the oral and written evidence goes to support the contentions of the defendant; but, because the railway car containing the liquor was in the bills of lading described as a car of laths and was billed to Toronto, addressed to a fictitious company, and at Toronto re-billed to Cleveland, again described as containing laths, the magistrate was of opinion that he could and he did call into play and rely upon the provisions of subsec. 9 of sec. 70 of the Ontario Temperance Act for the purpose of enabling him to make a finding that the liquor seized was, at the time of its seizure, being kept for sale in Ontario, contrary to the Act.

On a motion to quash the magistrate's order, the learned Judge whose order is appealed from reviewed the evidence, and was of opinion that "upon the whole evidence reasonable men could not come to the conclusion to which the magistrate had given effect," and quashed the order of confiscation.

The Attorney-General appeals, and on his behalf it was urged:—

(a) That the learned Judge whose order is appealed from erred in undertaking to review and weigh the evidence.

(b) That, if there was any evidence to support the finding, the learned Judge was bound to dismiss the application to quash, for this proposition relying on *Rex v. Rankin* (1919), 45 O.L.R. 96; *Regina v. St. Clair* (1900), 27 A.R. 308; *Rex v. Carter* (1916), 26 Can. Crim. Cas. 51, 28 D.L.R. 606.

(c) That the magistrate had determined that, at the time the liquor was seized, it was not in course of transit through Ontario, and that the magistrate in coming to this conclusion was entitled to call to his aid the provisions of subsec. 9 of sec. 70.

(d) That, even if, in determining that question, he was not entitled to rely on subsec. 9, there was evidence sufficient to support the conclusion arrived at.

For the defendant it was contended:—

(a) That the learned Judge was entitled to weigh the evidence, and if of opinion that no reasonable man considering it could properly come to the conclusion arrived at by the magistrate, he was right in quashing the order: *Rex v. Lemaire*, 48 O.L.R. 475; *Rex v. Mooney*, 49 O.L.R. 274.

(b) That the magistrate did not purport to determine the issue as to transit, but refused and neglected to determine that as a preliminary issue.

(c) That, unless and until that question was determined, he could not call into play nor make applicable the Ontario Temperance Act, or any of its provisions.

(d) That without the aid of the statute, there was no evidence to support a finding that the liquor, at the time of seizure, was not in transit from Montreal to Cleveland.

I do not think it is in this case necessary to determine the limits or powers of a Judge, on a motion to quash a conviction or a magistrate's order, to review, consider, and weigh the evidence; but I take this opportunity to point out that the right or power to review and supervise the proceedings of an inferior tribunal is not limited by statute or rule of law, but is founded on the inherent jurisdiction of the Court to see that justice is done.

I am of opinion that the Ontario Temperance Act is not intended to be, and is not, an Act of such general application as enables the Court to say that it applies to all liquor found in the Province of Ontario, or to all handling of liquor in Ontario, or to every transaction or dealing with or in respect of liquor in Ontario. Sections 139 and 43 of the Act were, I think, enacted

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to declare and make it clear that the Act was intended to be one of limited application, i.e., one limited to matters, dealings, and transactions in liquor, provincial in their nature, and in particular that it was not an Act intended to affect the transit of liquor through Ontario from a point outside of Ontario to a destination outside of Ontario. See also the Liquor Transportation Act, 1920, 10 & 11 Geo. V. ch. 80, sec. 6 (O.) It seems to me that such a transaction could not be described as a matter "merely local in its nature," or one taking place "wholly within Ontario." See *Attorney-General of Manitoba v. Manitoba Licence Holders' Association*, [1902] A.C. 73, at p. 78; *Attorney-General for Ontario v. Attorney-General for Canada*, [1896] A.C. 348, at p. 363; *Rex v. Waller*, 34 Can. Crim. Cas. 312, 60 D.L.R. 557. And therefore, where the question is raised as to the Act being applicable, it is not, as was contended by the Attorney-General, right to cast upon the defendant the onus of establishing and obtaining a finding that it is not applicable: *Rex v. Diamond* (1921), 59 D.L.R. 109, at p. 113.

Under the English Bankruptcy Act, which is limited in its application to persons domiciled in England, the Court in *Ex p. Cunningham*, 13 Q.B.D. 418, and in *Ex p. Barne*, 16 Q.B.D. 522, was of opinion that, the question of domicile being raised, it was for the petitioner to establish jurisdiction by proving English domicile. The question of shipment and transit from Montreal to Cleveland being raised, I am of opinion that it was necessary for the Crown to prove that the liquor was within the purview and ambit of the Act—the legislative jurisdiction of the Province—by establishing that the liquor was not being transported through Ontario from a point outside of the Province to a destination outside of the Province; and that, unless and until that question was determined adversely to the defendant, the magistrate had no right or power to rely upon or call to his assistance subsec. 9 of sec. 70.

It is conceded that the liquor was shipped from Montreal to Toronto, in a car described in the bill of lading as containing laths, and was addressed to a fictitious company. The magistrate accepted as truthful the evidence of the railway clerk to the effect that, while the liquor was yet at Toronto in the possession of the carrier, and before its seizure, the defendant had instructed the railway company to reshipe the car to Cleveland.

To me it appears that the magistrate refused to consider or determine what, to my mind, was a necessary preliminary to his relying on subsec. 9—that is, was the liquor within the ambit of the Act? Was it, at the time of its seizure, in course of transit

from Montreal to Cleveland? On my reading of the transcript of the proceedings at the hearing, the magistrate ignored or refused to consider and determine that question before calling to his assistance subsec. 9, but, applying subsec. 9 to the admitted facts that the liquor was improperly addressed, described, and concealed, found that it was being kept within Ontario contrary to the Act.

It was argued that the pronouncement of the magistrate necessarily involved a determination of the question I have been discussing. I am of the opinion that, if it does that, the magistrate in determining the preliminary question improperly relied on subsec. 9 of sec. 70, and in doing so misdirected himself, and particularly in respect of the preliminary question to be tried and determined, and the evidence applicable thereto, and the onus and burden of proof in respect thereof; and that it cannot be said that the order of the magistrate is the result of a proper judicial inquiry and determination of the issues to be tried that should not be quashed if any of the evidence relied upon by the magistrate is sufficient to support his conclusion. If I am right, and the magistrate so misdirected himself, I think it is clear that in such circumstances the learned Judge whose order is appealed from was, and we are, entitled to review the evidence, not merely to satisfy ourselves that there was or was not evidence on which the magistrate might have made the necessary finding had he directed himself properly, but to satisfy ourselves that he acted on such evidence, and that the course of justice was not in any way impeded by bias, prejudice, fraud, or erroneous view of the law: *Rex v. Nat Bell Liquors Limited* (1921), 35 Can. Crim. Cas. 44, 83, 56 D.L.R. 523.*

Having carefully read and considered all the evidence, I am of the opinion that the learned Judge whose order is appealed from was right in his opinion as to the effect of the evidence and the conduct of the magistrate, and I would dismiss the appeal.

Appeal allowed (FERGUSON, J.A., *dissenting*).

*The reference is to the case in the Supreme Court of Alberta: see also *Rex v. Nat Bell Liquors Limited*, in the Privy Council, [1922] 2 A.C. 128.

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Dec. 27.

HOODLESS V. LONG.

Sale of Goods—Conditional Sale—Repossession by Vendor—Action for Conversion—Defence of Justification under Terms of Sale-agreement—Estoppel—Removal of Goods—Consent—Practice—Application to Stay Proceedings—Return of Goods—Compensation for Loss—Trover—Assertion of Right under Agreement—Measure of Damages—Costs—Appeal.

The defendant made a conditional sale of a piano to the plaintiff; the plaintiff paid a small sum in cash and agreed to pay the balance of the price in monthly instalments. By the agreement it was provided that until the whole purchase-money should be paid the piano should remain the property of the defendant, but should be at the plaintiff's risk; that in case of default for one month in making any of the payments, or if the piano should be removed from the plaintiff's premises (described) without the consent in writing of the defendant, the whole balance of the purchase-money should, at the option of the defendant, become due, and he might resume possession of the piano and resell it; and that if, for any reason, the defendant should consider himself insecure, he might declare the agreement or any promissory notes or other securities "due and payable even before maturity of same." A few months after the sale, the plaintiff moved from the premises described in the agreement to other premises in the same city, taking the piano with him. Afterwards, leaving Ontario, but continuing to make his payments, he stored the piano in a warehouse in the same city. There was no written consent to either removal, but, according to the plaintiff's testimony, the defendant knew of and consented to each removal. A short time after the second removal, the defendant took the piano from the warehouse and removed it to his own premises. There was at that time no default in the monthly payments. The plaintiff brought this action for conversion, and the defendant pleaded that he was justified in taking the piano, because the removal to the warehouse was for the purpose of sale there and was made without his knowledge or consent:—

Held, that it was not open to the defendant to support his case by contending that he was entitled to take the piano because he considered himself insecure—that had not been pleaded and a different defence had been set up.

The defendant was estopped by what occurred between him and the plaintiff from setting up the absence of a consent in writing to the removal; and the defendant had failed to prove any justification for taking the piano out of the possession of the plaintiff.

If what the defendant did amounted to a conversion of the piano, he might, as soon as he was served with the writ of summons, have applied for a stay of proceedings in the action on his returning the possession of the piano to the plaintiff, when an order to stay would have been made, on proper terms as to costs and compensation to the plaintiff for any loss he had sustained by being deprived of possession. The old practice which enabled this to be done still obtains.

Griffiths v. Grand Trunk R.W. Co. (1907), 9 O.W.R. 875, 882, approved. The defendant had no right to take possession, and for the wrong done he was liable, but not in trover: what he did was in assertion of a supposed right under the agreement, which both parties treated as still in force until just before the action was begun.

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The measure of the plaintiff's damages was the loss he had sustained by being deprived of the possession of the piano.

The judgment of the County Court of the County of York, by which the plaintiff was awarded \$175 and his costs of the action, was varied, on appeal, by reducing the amount to \$50, with costs of the action fixed at \$50; and no costs of the appeal were allowed to either party.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant from a judgment of the County Court of the County of York, dated the 4th October, 1921, which was directed to be entered by His Honour Judge Wismer, after the trial before him, without a jury, on the 28th September, 1921.

The action is brought for the conversion of a piano. The appellant made a conditional sale of the piano to the plaintiff, the respondent, on the 15th May, 1919. The terms of the sale are embodied in an agreement signed by the respondent and bearing that date, which states that the respondent had rented and received on hire (with an agreement to purchase) the piano, for which he agreed to pay \$45 in cash and the balance of \$555 in monthly instalments of \$10 each, commencing on the 15th June, until the whole price should be paid "with interest at 7 per cent. per annum on the unpaid balance after 4 years from date of sale."

The agreement also provides:—

That until the whole purchase-money shall be paid the piano shall remain the property of the appellant, but shall be at the respondent's risk.

That, in case of default for one month in making any of the payments, or if the piano is removed from 881 Lansdowne avenue, without the consent in writing of the appellant . . . the whole balance of the purchase-money shall, at the option of the appellant, become due, and he may . . . resume possession of the piano and resell it.

That, if possession is resumed, the respondent shall remain liable for the whole purchase-money, but shall be entitled to credit for the proceeds of the sale after deducting expenses.

That if, for any reason, the appellant should consider himself insecure, he may declare the agreement or any promissory notes or other securities "due and payable even before maturity of same."

The respondent appears to have made all the monthly payments down to and including the payment for January, 1921, the last payment having been on the 15th of that month.

The respondent's residence is referred to in the notes of

evidence as 881 Ramsden avenue, though called 881 Lansdowne avenue in the agreement. In December, 1919, the respondent moved to 735 St. Clarens avenue, taking the piano. It was moved to the new residence by the appellant, who was paid \$5 for moving it. According to the respondent's testimony, he asked if it was necessary to get a written consent to the removal and was told that it was not. In August, 1920, the respondent went to Pennsylvania. While there he continued making his payments. Before leaving, the respondent removed the piano to the warerooms of the Broderick Furniture Company to be stored; and, according to his testimony, he got the appellant's consent to his doing this, and the appellant told him that he might sell his equity in the piano to anybody, if he sent the buyer to him and got it "transferred over." According to the testimony of Mr. Broderick, when the piano was left with his company, the respondent said: "If anybody wanted to buy it (and he could get his money out of it), to ring up Mr. Long and tell him about it and let them put the sale through."

On the 14th September, 1920, the appellant took the piano from Broderick's warehouse and removed it to his own premises.

It is admitted that at that time there was no default in paying the monthly instalment to warrant the appellant's taking possession of it, but in his statement of defence the appellant sets up that he was justified in taking it, because the removal of the piano to the Broderick premises was for the purpose of sale there and was made without his knowledge or consent.

By the judgment of the County Court the plaintiff (respondent) was awarded \$175 and his costs of the action.

November 10. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

E. F. Raney, for the appellant, argued that he was entitled to remove the piano because he considered himself insecure; that there had been no conversion; that he had never terminated the contract, nor repudiated it: *Bridgman v. Robinson* (1904), 7 O.L.R. 591; *National Cash Register Co. v. Stanley* (1921), 37 Times L.R. 776; Halsbury's Laws of England, vol. 7, p. 422. In these circumstances, the measure of damages, if any, to the plaintiff, would be the loss he had sustained by being deprived of the possession of the piano, which would be merely nominal.

T. J. Agar, K.C., for the plaintiff, respondent, argued that the appellant was guilty of conversion. He could not justify his action in taking the piano out of the respondent's possession. The measure of damages should be the sum which the respondent had paid to the appellant on account of the price: the *Bridgman* case, *supra*.

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Raney, in reply.

December 27. The judgment of the Court was read by MEREDITH, C.J.O. (after stating the facts as above):—Upon the argument, counsel for the appellant endeavoured to support his case by contending that he was entitled to remove the piano because he considered himself insecure. It is unnecessary to consider how far that contention could be supported if it had been set up in the appellant's pleading; not having been so set up, it is not open to the appellant, especially in view of the defence justifying the taking because of the removal of the piano to the Broderick premises.

The appellant, in my opinion, failed to prove any justification for taking the piano out of the possession of the respondent. He is clearly estopped by what occurred between him and the respondent from setting up the absence of a consent in writing to the removal, and indeed he does not set up the want of a written consent, but alleges, as I have mentioned, that the removal was for the purpose of sale and without his knowledge and consent.

It follows that the respondent is entitled to recover, but there remains to be dealt with the question as to the measure of his damages.

In the statement of defence, para. 9, it is pleaded that, "subsequently, namely, on the 14th February, 1921, the defendant's solicitors again offered to the plaintiff's solicitors to allow the plaintiff to repossess the said piano under the terms of the original agreement."

If what the appellant did amounted to a conversion of the piano—an aspect of the case I will deal with later on—it is to be regretted that the appellant did not, as soon as he was served with the writ of summons, apply to stay proceedings in the action on his returning the possession of the piano to the respondent, when no doubt an order to stay would have been made on proper terms as to costs and compensation to the respondent for any loss he had sustained by being deprived of the possession of the piano.

The old practice which enabled this to be done was not abrogated by the Rules, but still obtains: see *Griffiths v. Grand Trunk R.W. Co.* (1907), 9 O.W.R. 875, 882.*

**Griffiths v. Grand Trunk R.W. Co.* was decided by a Divisional Court of the High Court of Justice (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) on the 30th April, 1907. The action was for damages for detention and conversion of certain "dump-cars" used in construction work. The defendants appealed from the judgment at the trial, by which the plaintiff was awarded \$7,200 damages. RIDDELL, J., who read the judgment of the Court, said that there was ample evidence of conversion,

I come now to the question as to whether there was any conversion of the piano. I am of opinion that there was not. As I have said, there was no right to take possession, and for that wrong the appellant is liable, but it does not follow that he is liable in trover. What he did was in assertion of a supposed right under the agreement, and he has never treated the agreement as at an end or done anything that amounted to a repudiation of it entitling the respondent to rescind.

Both parties treated the agreement as still on foot until just before the action was begun, when a demand was made on the appellant for the return of the piano; the respondent did this by paying several of the monthly instalments and charges for storage after the appellant had taken possession of the piano; and the appellant has never done anything except in pursuance of his supposed rights under the agreement.

The measure of the respondent's damages is the loss he has sustained by being deprived of the possession of the piano; for some of the time that was no loss, but a benefit, because it saved him paying storage charges. There is little material for determining what his loss is; but, in my view, if his damages are assessed at \$50, he will have no cause to complain.

I have had some doubts as to how the costs of the litigation should be dealt with, but have reached the conclusion that the respondent should have his costs, fixed at \$50, and that there should be no costs of the appeal to either party.

Judgment of the County Court varied.

and the trial Judge was right in holding that the defendants were liable as for a conversion. "We were told on the argument," the learned Judge said, "that the practice of defendants coming into Court after a conversion and applying for a stay had been abrogated. . . . None of us had ever heard of the abrogation of this useful practice, and no case was cited, nor have I found one so deciding. On the contrary, it seems to me that the effect of sec. 128 of the Ontario Judicature Act, R.S.O. 1897, ch. 51, is to continue that practice. . . . It would be absurd to suppose that such a power could be taken away from the Court except by express enactment."

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Dec. 28.

FLYNN V. CAPITAL TRUST CORPORATION.

Absentee—Appointment of Committee—Absentee Act, 10 & 11 Geo. V. ch. 36, secs. 7, 9—Action against Committee by Creditor of Absentee—Order Directing Reference for “Maintenance and Administration” of Estate—Delegation of Powers of Court to Referee—Unauthorised and Void Clause—“Administration,” Meaning of—Action against Absentee—Power of Committee to Defend—Rule 97—Powers and Duties of Court and Committee—Lunacy Act, secs. 12-23—Constitution of Action—Possible Death of Absentee—Practice—Claims Made before Referee in “Administration” of Estate.

In December, 1919, S. disappeared; no trace of him had since been found, and it was not known whether he was alive or dead. In May, 1920, an order was made by a Judge of the Supreme Court of Ontario declaring S. to be an absentee within the meaning of the Absentee Act (1920), 10 & 11 Geo. V. ch. 36, appointing the defendants committee of his estate, and directing a reference to an Official Referee to deal with the “maintenance and administration” of the estate of S. The order (as drawn up and issued, though not as pronounced) also contained this clause: “And the Court doth further order, in pursuance and by virtue of the said statute, that all such powers as are conferred upon the Court by the Absentee Act as may be necessary for the maintenance and administration of the estate of the said S. be and the same are hereby delegated to the said . . . Official Referee.” The plaintiff, claiming to be a creditor of S., sued the committee for a large sum of money. Section 7 of the Act provides that the Court may make an order for the administration of the property of an absentee; and sec. 9 provides that the powers and duties of the Court and committee shall be the same *mutatis mutandis* as those of the Court and committee under the Lunacy Act, R.S.O. 1914, ch. 68:—

Held, that the word “administration” in sec. 7 means merely “management,” and does not point to the winding-up and distribution of the estate: see secs. 12 to 23 of the Lunacy Act.

Held, also, applying the law with respect to lunatics, that the action should be against the absentee, and the committee would have power to defend it: Rule 97; no action would lie against the committee for anything done by the absentee; and the committee would not be a proper party to an action against the absentee.

Seemle, an action against S. would not be properly constituted unless his executor or administrator was before the Court; for S. might be dead, and substituted service upon a dead man would not be permissible.

Held, also, that, there being nothing in the Absentee Act nor in the Lunacy Act which authorises the delegation of the Court’s powers to a Referee, the clause of the order quoted above was void as unauthorised by any statute or practice; but, taking it at its face value, it had not the effect of precluding the Court from entertaining an action in respect of a claim which might be made in the proceedings before the Referee.

QUESTION of law raised by the pleadings and brought on for hearing by consent of the parties.

December 8. Argument was heard by MIDDLETON, J., in the Weekly Court, Toronto.

W. J. Boland, for the plaintiff.

F. J. Hughes, for the defendants.

December 28. MIDDLETON, J.:—Argument of question of law raised by the pleadings; counsel consenting to the question being now heard and determined.

In December, 1919, Ambrose J. Small disappeared; and, although every effort has been made to account for his disappearance, no trace of him has been found, and it is not known whether he is alive or dead.

On the 20th May, 1920, Mr. Justice Latchford made an order declaring Small to be an absentee within the meaning of the Absentee Act (1920), 10 & 11 Geo. V. ch. 36, and appointing the defendants (the trust company and the wife of Small) his committee.

The plaintiff, claiming to be a creditor of Small, sues the committee to recover \$52,530. The claim may or may not be well-founded, but it is clearly one calling for investigation and which cannot be admitted.

The defendants raise certain questions of law in their defence: 1st. That the action should be against Mr. Small and not against the committee. 2nd. That under the order made the claim must be asserted and proved before Mr. Cameron, an Official Referee, referred to in the order.

This involves the consideration of the provisions of the Absentee Act and the order made.

Section 7 of the Act provides that the Court may make an order for the administration of the property of an absentee and may appoint a committee for that purpose.

It was argued before me that "administration" means administration in the sense in which that word is used when what is intended is the winding-up and distribution of the estate of a deceased person, and that for that reason the Rules relative to administration proceedings apply. Clearly this is not so. "Administration" is used here in a sense substantially equivalent to "management."

This is plain from sec. 9, which provides that the powers and duties of the Court and committee shall be the same *mutatis mutandis* as the powers and duties of the Court and committee under the Lunacy Act. Turning to that Act, R.S.O. 1914, ch. 68: secs. 12 to 23 make it plain that the powers of the Court and committee are limited to the "management and administration" of the lunatic's estate, including the conservation of all

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assets and payment of all debts, with the right to use his property for the maintenance of his family.

When a claim is made against a lunatic's estate which ought to be resisted, an action may be brought against him and his committee may defend him—Rule 97. No action will lie against the committee with respect to anything done by the lunatic. And the committee is not a proper party to the action.

I can see no reason why this law should not apply to the case of an absentee. I am told that an application to add Small as a party defendant is pending: if this is done, the plaintiff may yet be in trouble; as, if the absentee is dead, the action will not be well-constituted unless his executor or administrator is before the Court. Substituted service upon a dead man is not permissible. This is a matter of importance, because from the nature of the claim put forward it is likely to depend largely, if not altogether, upon the plaintiff's own evidence, and the plaintiff cannot succeed, if his claim is against the estate of a deceased person, without corroborative evidence.

The second point argued turned largely upon the misunderstanding of the term "administration," but was also based upon a provision found in the order (which it was agreed should be taken to be properly before me).

After appointing the committee, the order refers the matter to the Referee to deal with the "maintenance and administration" of Small's estate. (The statute uses the word "administration" and the Lunacy Act the words "management and administration"). Then follows this provision:—

"And the Court doth further order, in pursuance and by virtue of the said statute, that all such powers as are conferred upon the Court by the Absentee Act as may be necessary for the maintenance and administration of the estate of the said Ambrose J. Small be and the same are hereby delegated to the said J. A. C. Cameron, Esquire, Official Referee."

There is no provision in the statute which speaks of a reference or the delegation of the Court's powers.

There is no provision in the Lunacy Act which authorises the delegation of the powers of the Court to a Master or Referee, and in practice such a thing is unheard of. When the Court requires information as to a lunatic's estate, before exercising its powers it may refer it to a Master to devise and report a scheme for the management of his estate and his maintenance, but such report must always be brought before the Court for adoption before being acted upon. Such reports do not become confirmed by filing and lapse of time.

In the Rules permitting certain matters to be dealt with by

subordinate officers, "Proceedings as to Lunatics" is excepted from the Master's jurisdiction: Rule 208 (5).

The only place Referees have in our jurisprudence, under the provincial Acts, is that actions may be referred to them under secs. 64 et seq. of the Judicature Act, in the circumstances pointed out by these sections.

Under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, sec. 110, the Court may, subject to an appeal, refer and delegate any of its powers under the Act to "any officer of the Court," an expression wide enough to cover a Referee. (See sec. 76 of the Ontario Judicature Act, R.S.O. 1914, ch. 56.)

My brother Latchford tells me he was not asked for any such order, and made no such order, and is at a loss to know how this clause came to be inserted in the order by the Registrar. There is no precedent for it, as this was the first order under the Act, and nothing of the kind appears in the ordinary lunacy order.

The clause appears to me to be void as unauthorised by any statute or practice.

But, beyond this, the argument now made is that the clause in the order precludes the Court from entertaining an action. Accepting the clause at its face value, I cannot see that it has any such effect.

The result is that the action should be dismissed as to the committee. I say nothing as to any right of amendment nor as to any new action against Small.

Costs to follow the event.

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Dec. 29.

SHUTER V. PATTEN.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Incumbrance—Inchoate Right of Dower—Purchaser Taking Possession without Knowledge of Vendors—Action to Recover Possession—Counterclaim—Pleading—Specific Performance with Abatement of Purchase-money—Terms Imposed upon Purchaser—Interest—Costs—Conduct of Purchaser—Remedy by Application under Vendors and Purchasers Act.

A wife's inchoate right of dower is something in the nature of an incumbrance, and a vendor making title to land is bound to remove it.

Van Norman v. Beaupré (1856), 5 Gr. 590, followed.

Where the carrying out of an agreement for the sale and purchase of land was delayed by reason of the difficulty of procuring the wife of one of the vendors to execute the conveyance to the purchaser for the purpose of barring her dower, and notice was given to the purchaser, who had gone into possession without the knowledge of the vendors and had made improvements, to vacate the premises, it was *held*, in an action by the vendors to recover possession or compel completion of the purchase, in which the purchaser counterclaimed for specific performance or for a return of the sale-deposit and damages for expenditures made and costs and expenses incurred, that, as both parties had pleaded their willingness to carry out the sale—the purchaser upon being tendered a conveyance free from dower or upon receiving compensation—it was not necessary to decide whether the contract had been formally terminated, pursuant to certain provisions in the agreement; the case resolved itself into a question of the terms upon which specific performance should be granted.

The recalcitrant wife expressing, at the trial of the action, her willingness to release her dower for \$100, judgment was given for specific performance with compensation fixed at \$100, upon terms as to payment by the purchaser of interest and costs.

These terms were imposed because: (1) the purchaser had refused an apparently reasonable offer to secure her against the dower-claim and had made no offer to take the title with compensation to be fixed by the Court (*Bowes v. Vaux* (1918), 43 O.L.R. 521, 526); (2) she took possession without the knowledge of the vendors, and was saved from being confronted with an apparent waiver of objection to the title only by the forbearance of the vendors' solicitor; (3) she had retained possession for an unreasonable time (*Nicloson v. Wordsworth* (1818), 2 Swanst. 365) without making any payment, and had insisted upon being reimbursed for expenditures for which she had no legal claim.

Semble, if either party had applied to the Court under the Vendors and Purchasers Act, the difficulty might have been cleared up and the rights adjusted without delay.

ACTION by vendors of land to recover from the purchaser possession of the land and a house thereon, or, in the alternative, to compel completion of the purchase. Counterclaim by the defendant for specific performance of the agreement for sale and purchase, or, in the alternative, for the return of the sale-

deposit and for damages for expenditures made by the defendant and costs and expenses incurred.

The action and counterclaim were tried by HODGINS, J.A., without a jury, at a Toronto sittings.

Peter White, K.C., for the plaintiffs.

Norman Sommerville, for the defendant.

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December 29. HODGINS, J.A.:—Action by vendors against purchaser to recover possession of house and premises No. 1111 Davenport road, in the city of Toronto, or, in the alternative, for completion of the purchase thereof.

The agreement is dated the 7th June, 1920, the purchase-money being \$5,000, of which \$200 was to be (and was) paid as a deposit; \$800 in cash on completion of sale; a first mortgage of \$1,750 to be assumed, and a second mortgage given for the remainder of the purchase-money.

Provision was made in the agreement as follows:—

“If within that time” (i.e., 10 days) “she shall furnish the vendors in writing with any valid objection to the title which the vendors shall be unable or unwilling to remove, and which the purchaser will not waive, this agreement shall be null and void, and the deposit of money returned to the purchaser without interest.”

The title was examined within the 10 days, requisitions were made and answered, a draft deed and a draft mortgage were submitted and approved, and everything was ready for completion before the 1st day of July, the stipulated date. The deed contained the names of the two plaintiffs as grantors and the names of their respective wives to bar dower. The transaction was not closed on the 1st July owing to the fact that difficulty was experienced in getting Rose Shuter, wife of one of the plaintiffs, to sign the deed barring her dower, and she never did sign.

The cause of the delay was not known to Mr. Richards, solicitor for the defendant, prior to the 1st July, 1920, nor till the 5th August, 1920. The fact was that a definite refusal by Rose Shuter appears to have been somewhat unexpected, as I am satisfied that Mr. Lockhart Gordon, solicitor for the plaintiffs, was, and his clients were, before the contract was signed and for some time afterwards, under the impression that, notwithstanding the objection Rose Shuter was making, she would ultimately do as she had done on previous occasions, and complete her bar of dower.

Correspondence arose which lasted until December, 1920.

Hodgins, J.A. A proposal was made on behalf of the plaintiffs to deposit the
1921. sum of \$271 with a trust company, and in that way to give
security against any possible claim for dower. This offer was
refused, however; and, failing an agreement, notice was given
requiring the defendant to vacate the premises.

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It appears that some time during July, 1920, and without the knowledge of the plaintiffs or their solicitor, the defendant, having to move out of the property she was then occupying, and assuming that everything would be all right, went into possession of the premises and made improvements in the way of decoration, painting, etc., to the value of about \$190. On the evidence I cannot find that either of the plaintiffs or the plaintiffs' solicitor knew of or encouraged the taking possession, although when they became aware of it they continued to treat with her own solicitor regarding the dower, in the hope that an adjustment would be made, during which time they never insisted, nor did their solicitor, that the title in this respect had been waived by the taking of possession. The defendant has remained in the house since July, 1920—nearly 18 months—and has paid nothing. It was argued on behalf of the plaintiffs that the contract had been properly terminated by notice, and that the provision in the contract which I have quoted in itself warranted their action, and that the defendant should pay occupation rent at the rate of \$50 a month.

I am relieved of the necessity of deciding whether or not the contract was formally terminated because of the pleadings in the action. In para. 8 of the statement of claim it is stated that the plaintiffs have always been ready and willing and still are ready and willing to carry out the sale to the defendant, and in the statement of defence the same desire is shewn, and the offer is made to carry out the contract on being tendered a conveyance free from dower. If I had to decide it, the facts seem to resemble somewhat, in this aspect, those of *Merrett v. Schuster*, [1920] 2 Ch. 240. The case to my mind resolves itself into a question of the terms on which specific performance should be granted, and the defendant's counsel expressed his client's willingness to carry out the contract if allowed compensation.

A wife's inchoate right of dower is something in the nature of an incumbrance, and that the vendor is bound to remove it is a proposition which admits of no doubt. This was laid down at an early date in this Province. See *Van Norman v. Beaupré* (1856), 5 Gr. 590, where the decree was made for specific performance with compensation to be determined on ascertaining the present value of the incumbrance. It falls within the rules

laid down as to compensation in *Rutherford v. Acton-Adams*, [1915] A.C. 866.

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It appears from the evidence that no direct request was made by either of the plaintiffs to Rose Shuter to sign the deed, but no doubt that was done by their solicitor. The defendant called Rose Shuter as a witness, and she expressed her willingness to release her dower for the sum of \$100. Her readiness to accept this amount and to bar her dower does not appear to have been communicated to the plaintiffs or their solicitor until the 1st December, 1921, long after the action had been begun in January, 1921. The plaintiffs took the position that the contract had been already terminated, this suit being then pending.

At no time did the defendant express her willingness to take such title as the plaintiffs could give, with an abatement to be fixed by the Court, nor was she ever at any time ready to accept the proposition made on the 8th September, 1920, to deposit \$271, to be held by a trust company for Rose Shuter, in the event of her husband predeceasing her.

Upon the best consideration I can give to the matter, I think the proper judgment is for specific performance with compensation, which I fix at the sum of \$100.

I feel, however, that in the circumstances and but for the offer made in the pleadings by the plaintiffs, it would be difficult to grant specific performance, and I shall therefore only do so on terms. Those terms are that the purchaser must pay interest from the date she took possession upon the mortgages and at the rate of 7 per cent. upon the amount of purchase-money (less \$100) unpaid, that being the rate which the plaintiffs could have obtained on the cash-payment if made, and she must complete the sale within two weeks from the date of this judgment. She must also, I think, pay the general costs of the action and counterclaim. My reasons for imposing these terms on the defendant are as follows:—

1. She refused an apparently reasonable offer to deposit a sufficient amount of money with a trust company to secure the defendant against this dower-claim, and made no offer to take the title with compensation to be fixed by the Court—see *per Middleton, J.*, in *Bowes v. Vaux* (1918), 43 O.L.R. 521, at p. 526.

2. She took possession without the knowledge of the plaintiffs, and is only saved from being confronted with an apparent waiver of title by the forbearance of the plaintiffs' solicitor.

3. She has, under all the circumstances, retained possession for an unreasonable time—some 18 months—without making

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any payment, and has insisted on being paid an expenditure for which she has no legal claim.

In *Nicloson v. Wordsworth* (1818), 2 Swanst. 365, it is said: "If a purchaser take possession under a contract and afterwards rejects the title, he must relinquish the possession." See also *King v. King* (1833), 1 My. & K. 442; *Rankin v. Sterling* (1902), 3 O.L.R. 646; *McNiven v. Pigott* (1915), 33 O.L.R. 335, 22 D.L.R. 147.

Judgment will, therefore, be entered declaring that the contract should be specifically performed on the terms I have mentioned. The judgment will contain a direction that unless those terms are carried out within the time limited there will be judgment against the defendant for possession and for occupation rent, which I fix at \$45 per month from the time when possession was taken, with costs of action and counterclaim.

It is to be regretted that neither party applied under the Vendors and Purchasers Act, under which the only real difficulty could have been cleared up and the rights of the parties adjusted without the delay which has occurred in this case. See *Thompson v. Ringer* (1881), 44 L.T.R. 507; *McNiven v. Pigott* (1914), 31 O.L.R. 365, at pp. 374, 375, 376.

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[APPELLATE DIVISION.]

1921.

Dec. 29.

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Feb. 27.

DULMAGE V. BANKERS FINANCIAL CORPORATION LIMITED.

Sale of Goods—Conditional Sale of Motor Car to Dealers but not for Resale—Registration of Conditional Sale Agreement—Protection of Vendors' Ownership—Conditional Sales Act, sec. 3 (3), (4)—Resale to Innocent Purchaser—Property and Ownership not Passing—Caveat Emptor.

The C. company sold a motor car to M. & H., a firm of dealers in motor cars, under a conditional sale agreement. The vendors assigned the benefit of the agreement to the defendants; the agreement was duly registered in accordance with the requirements of the Conditional Sales Act, R.S.O. 1914, ch. 136; and its regularity was not questioned:—

Held, that, although M. & H. were dealers in cars, this car was not sold to them "for the purpose of resale . . . in the course of business" (sec. 3 (3) of the Act), and upon a resale by them, even to an innocent purchaser, the property in and ownership of the goods did not pass (sec. 3 (4)).

The original vendors did all they could under the law to protect their ownership; and, there being no statutory provision which could relieve the plaintiff, the purchaser, the maxim *caveat emptor* applied to his purchase from persons who could give no title.

ACTION to recover damages for the alleged wrongful conversion by the defendants of a motor car.

November 14 and December 23. The action was tried by ORDE, J., without a jury, at Picton and in Toronto.

R. R. Hall, K.C., and *F. L. Ward*, for the plaintiff, referred to Benjamin on Sale, 6th ed., p. 13; *National Mercantile Bank v. Hampson* (1880), 5 Q.B.D. 177; *Dedrick v. Ashdown* (1887), 15 Can. S.C.R. 227; *Taylor v. McKeand* (1880), 5 C.P.D. 358; *Ellis v. Glover & Hobson Limited*, [1908] 1 K.B. 388; *Delaney v. Downey* (1912), 21 W.L.R. 577; *Brett v. Foorsen* (1907), 7 W.L.R. 13.

C. W. Plaxton and *G. G. Plaxton*, for the defendants, cited Barron's Conditional Sales Acts, 2nd ed. (1907), p. 44; *Coggill v. Hartford and New Haven R.R. Co.* (1854), 3 Gray (Mass.) 545; *Sargent v. Metcalf* (1855), 5 Gray (Mass.) 306; 35 Cyc. 681, 682; *McRorie v. Seward* (1910), 3 Sask. L.R. 69; and, as shewing by analogy the construction to be placed on the first two lines of sec. 3 (3) of the Conditional Sales Act, *Phair v. Phair* (1900), 19 P.R. 67.

December 29. ORDE, J.:—The action is brought to recover damages for the alleged wrongful conversion by the defendants of a motor car. The car in question had been sold by Cola-

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way Motors Limited to the firm of Mahood & Havery, dealers in motor cars at Peterborough, under a conditional sale agreement. The vendors assigned the benefit of the agreement to the defendants, and the agreement was duly registered in accordance with the requirements of the Conditional Sales Act, R.S.O. 1914, ch. 136. The car was afterwards purchased by the plaintiff from Mahood & Havery, but was later seized by the defendants.

No question arises as to the regularity of the conditional sale agreement, but it is contended by the plaintiff that, under subsec. 4 of sec. 3 of the Conditional Sales Act, a purchaser of the car from Mahood & Havery could acquire a title thereto in spite of the agreement and its registration.

Subsections 1 and 2 of sec. 3 require the vendor under a conditional sale agreement to reduce the agreement to writing and to register it in order to protect himself against *bonâ fide* purchasers or mortgagees for value without notice. If the vendor complies with these provisions, his title to the goods cannot be affected by any act of the conditional purchaser, except as provided in subsecs. 3 and 4, which are as follows:—

“(3) Where the delivery is made to a trader or other person for the purpose of resale by him in the course of business, such provision shall also, as against his creditors, be invalid and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with.

“(4) Where such trader or other person resells the goods in the ordinary course of his business, the property in and ownership of such goods shall pass to the purchaser notwithstanding that the provisions of this Act have been complied with.”

By subsec. 3, the protection which subsecs. 1 and 2 afford to purchasers and mortgagees is extended to creditors in the cases indicated. It has no bearing upon the question involved in this action, but a reference to it is necessitated by the language of subsec. 4, the words “such trader or other person” there used evidently referring to “a trader or other person” to whom goods have been delivered “for the purpose of resale by him in the course of business.”

The plaintiff says that Mahood & Havery were traders or persons engaged in the business of buying and selling motor cars, and that the car in question was delivered to them by Colaway Motors Limited for the purpose of resale by them in the course of such business, and that consequently the plaintiff, when he purchased the car from them, acquired a good title against the original vendors and those claiming under them, notwithstanding the registered agreement, by virtue of subsec. 4.

Colaway Motors Limited from time to time sold cars to Mahood & Havery for the purpose of resale, under a form of conditional sale agreement which they called a "wholesale contract form." Under this form of agreement, the car was kept in the warehouse of the dealers, Mahood & Havery, until sold to a retail purchaser, and the price ultimately payable by Mahood & Havery to the Colaway Motors Limited depended upon the list-prices in force at the time of such resale. The car in question here was not sold under any such agreement, but under the form of retail agreement used for conditional sale to an ordinary retail purchaser. The car was not kept by Mahood & Havery in their warehouse at Peterborough until sold, as was done with the other cars, but was used by them for the purposes of their business, but chiefly for the purpose of demonstrating the particular make of car to prospective purchasers. The agreement was made on the 4th April, 1921, the purchase-price being \$2,497.81, on which \$832.60 was paid in cash, and the balance, amounting to \$1,665.21, was to be paid in 10 monthly instalments of \$166.52 each, the first to be paid on the 4th May, 1921. Three of these instalments were paid. The contract contained an express covenant by the purchasers that they would not sell, assign, transfer, or make over their rights in the car without the previous written consent of the vendors or their assigns.

During the months of July and August, 1921, Mahood & Havery were going behind, and they finally became bankrupt about the 20th August. About the 9th July, they gave instructions to one Percy E. Dulmage, who was employed by them as a salesman, to try to sell the demonstrating car. Dulmage thereupon drove the car from Peterborough down into Prince Edward county, and after some negotiations sold the car to the plaintiff, a distant cousin of his own. The price was \$1,800, Dulmage taking in exchange a Ford car at a valuation of \$300, in cash \$100, a cheque for \$1,200, and a note for \$200. On the 12th August, an agent or bailiff of the defendants claimed the car from the plaintiff, and, after some inquiry as to the existence of the defendants' agreement, he allowed the defendants to take possession.

It is argued by counsel for the plaintiff that, notwithstanding the form of the conditional sale agreement and the covenant not to sell, the car was in fact delivered by the vendors to Mahood & Havery for the purpose of resale in the course of business, because used cars and demonstrating cars are usually and as a matter of business sold by dealers in motor cars. It is further urged that the description of Mahood & Havery on the back of

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the contract as "Gray-Dort and Columbia dealers" together with the reference in the description of the car to the list-price as \$2,795, while the net price to Mahood & Havery, exclusive of service charges, was \$2,295, indicates that Mahood & Havery were to sell the car at a profit of \$500. I am unable to see how the description of Mahood & Havery as dealers can affect the matter. They were in fact dealers in motor cars, and, if their calling or business were to be given at all, that was the only way of giving it correctly.

The explanation of the \$2,795 is that that was the list-price of the car as a new car, but that the car had been damaged and that the sale-price to Mahood & Havery was therefore reduced. Apart from this, it would not be unusual for the vendor to sell a car to a dealer even for his own use at a reduced price. The "\$2,795" appears in a schedule which sets forth the description of the car, including its type, model, year of manufacture, colour, number of cylinders, etc. The contract itself makes no reference to this sum as constituting in any way a factor in the transaction, and its mention must have been merely for the purpose of more fully identifying the make and size of the car. It does not affect the character of the agreement. I cannot interpret the agreement as in any way justifying, as between the vendors and Mahood & Havery, a resale by the latter. The car was not, in my judgment, delivered by the conditional vendors to Mahood & Havery for the purpose of resale in the course of business within the meaning of subsecs. 3 and 4 of sec. 3 of the Act.

Holding this view, it seems unnecessary for me to do more than touch upon the other questions which were argued. Mr. Hall strenuously urged that the words "for the purpose of resale by them in the course of business" must be confined in their application to the words "other persons," and that a delivery to a "trader" for any purpose comes within the scope of the two subsections. Apart from the fact that this construction is a strained one, it would lead to this ridiculous result, that a delivery of a piano, for example, to a "trader" in motor cars, would enable the motor car dealer to resell and give a good title to the piano in spite of a registered agreement.

It was natural that a good deal should be said about the hardship to a purchaser of a motor car from a dealer in cars if he is to be put upon inquiry before purchasing in order to be sure of his title. But is the conditional vendor under such circumstances to be placed in any lower position than any other person who entrusts an article to one who happens to deal in the same class of goods? The hardship would be the same if the owner

of a repair-shop, who also dealt in motor cars, chose to sell a car left for repair. A jeweller with whom I leave my watch to be repaired can give no title to it to another, though he deals in watches. It is really the common question as to which of two innocent persons shall suffer for another's wrong. The owners of the car did all they could under the law to protect their ownership; and, unless some statutory provision comes to the relief of the plaintiff, the maxim *caveat emptor* applies to his purchase from one who could give no title.

The action will be dismissed with costs.

The plaintiff appealed from the judgment of ORDE, J.

February 27, 1922. The appeal was heard by MULOCK, C.J. Ex., KELLY, MASTEN, and ROSE, JJ.

R. R. Hall, K.C., for the appellant.

C. W. Plaxton, for the defendants, respondents.

At the conclusion of the hearing, the judgment of the Court was delivered by MULOCK, C.J.Ex.:—We are agreed that the learned Judge at the trial was right in his view of the facts of this case, and are of opinion that the car was sold to be used for purposes of demonstration and not for resale.

Appeal dismissed with costs.

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[IN BANKRUPTCY.]

Dec. 29.

RE FAIRWEATHERS LIMITED.

Bankruptcy—Claim of Insurance Broker—Moneys Paid for Premiums on Insurances Effectuated for Debtor—Cancellation of Policies before Assignment and Rebate Paid to Broker—Right of Broker to Retain in Reduction of Claim—Set-off—Bankruptcy Act, sec. 28 (1).

Shortly before an authorised assignment to a trustee, made by the debtor-company, the company were indebted to an insurance broker upon accepted drafts for fire insurance premiums paid by him on their behalf. Just before the assignment, the company arranged with the broker to cancel the insurance policies upon which he had paid the premiums represented by the unpaid drafts, and to have the amounts allowed by way of rebate for the unearned premiums paid by the insurance companies to the broker. The trustee raised no question as to the good faith of the transaction:—

Held, that the broker was entitled to apply the sum paid to him for rebates in reduction of the company's indebtedness, or by way of set-off against his claim for the amount of the premiums paid by him.

It would be inequitable that the broker who had "carried" the insured should not be able to recoup himself from the very premiums paid by him when refunded by the insurers.

Section 28 (1) of the Bankruptcy Act considered.

MOTION by C. J. Alloway, claimant, for a direction to the trustee in bankruptcy to allow a claim made in the bankruptcy proceedings.

December 23. The motion was heard by ORDE, J., in Chambers.

The claimant in person.

R. S. Cassels, K.C., for the trustee.

December 29. ORDE, J.:—The claimant is an insurance broker in Montreal, through whom the insolvent company had effected their fire insurance. It had been the practice for Alloway to place this insurance with different insurers, he paying the premiums, and debiting Fairweathers in his books with the payments. In some cases Fairweathers gave him promissory notes or accepted drafts for the premiums so paid, and in others the item was left in Alloway's books as an open account until paid.

Shortly before the assignment, which was made by Fairweathers on the 3rd August, 1921, they were indebted to Alloway upon accepted drafts for premiums paid by him on their behalf in the sum of \$1,028.35.

Prior to the making of the assignment, either on the 3rd

August, 1921, or a day or two earlier, Fairweathers arranged with Alloway to cancel the insurance policies upon which he had paid the premiums which were represented by the unpaid drafts, and to have the amounts allowed by way of rebate for the unearned premiums paid by the insurance companies to Alloway. The policies were accordingly cancelled, and the rebates, amounting in all to \$732.98, were paid to Alloway and were applied by him in reduction of Fairweathers' indebtedness to him.

Immediately after the making of the assignment, the trustee effected new insurance through Alloway, the premiums thereon amounting to \$1,275, but the trustee refused to pay Alloway more than \$542.02, claiming that the \$732.98 which Alloway had received from the insurance companies by way of rebate was an asset of the insolvent estate and ought either to be paid over to the trustee or to be applied in part payment of the \$1,275 payable in respect of the new insurance, and that Alloway was not entitled to apply the rebate in part payment of, or by way of set-off against, his claim of \$1,028.35.

There are many English decisions upon the question of set-off by insurance brokers, but they are difficult to apply in this case, because the provisions of the English Bankruptcy Act as to set-off are much wider than those of sec. 28 of our Bankruptcy Act. Our Act merely preserves the existing "law of set-off" and makes it applicable to all claims against the estate and to actions by the trustee for the recovery of debts due to the insolvent. But sec. 31 of the English Act of 1914 gives a right of set-off, where there have been "mutual dealings" between the insolvent and the claimant, in many cases where it would not otherwise be allowed. See Williams on Bankruptcy, 12th ed., pp. 160 et seq.

Subsection 1 of sec. 28* of our Act follows sec. 31 of the

*The Bankruptcy Act, 9 & 10 Geo. V. ch. 36, sec. 28 (1):—"The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the trustee for the recovery of debts due to the debtor in the same manner and to the same extent as if the debtor were plaintiff or defendant, as the case may be, except in so far as any claim for set-off shall be affected by the provisions of this Act respecting frauds or fraudulent preferences."

Ontario Assignments and Preferences Act, R.S.O. 1914, ch. 134, and sec. 107 of the Dominion Insolvent Act of 1875. Section 71 of the Dominion Winding-up Act, though worded differently, is in substance the same.

In the present case the trustee raises no question as to the good faith of the transaction, though it is apparent that an arrangement such as this on the eve of the assignment must have had as one of its objects, at least, the intention of protecting

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the insurance broker in respect of the premiums which he had paid for the insured. But it would clearly have been a hardship and wholly inequitable that the broker who had "carried," as the insurance phrase is, the insured by paying the premiums for him, should not be able to recoup himself and the estate from the very premiums themselves when refunded by the insurers. If he cannot do so, then the insolvents profit to that extent from the transaction.

An insurance broker occupies in many cases a somewhat peculiar position. He is frequently the agent both of the insurer and of the insured, and this relationship gives rise to particular rights and liabilities on the part of the broker. The practice of "carrying" the insured in some cases places him in a position analogous to that of the insurer himself. And it would seem to be wholly just and equitable that moneys properly coming back into his hands from the insurers in respect of unearned premiums upon cancelled policies should be retained by him. They have in fact come back into the hands of the only person who made the payments, and are in a sense earmarked as his money.

If, as in the present case, all element of fraud is eliminated, I see no reason why the agent, having lawfully received the rebates from the insurers, should not be entitled to set them off against the moneys owing by the insured to him, and I accordingly hold that the claimant is entitled to be paid by the trustee the sum of \$732.98 which the trustee has retained in his hands, the same to be set off by the claimant and applied upon his claim against the insolvent estate.

The trustee will get his costs of this motion out of the estate.

[IN CHAMBERS.]

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Ontario Temperance Act—Police Magistrate's Order for Forfeiture of Intoxicating Liquor—Jurisdiction—Person on whom Summons Served—"Owner" of Premises on which Liquor Found—Tenant in Possession—Sec. 4 (3) and (4) of Act.

Upon a motion to quash an order of a Police Magistrate, under sec. 70 of the Ontario Temperance Act, declaring forfeited to His Majesty a quantity of intoxicating liquor claimed by B., upon the ground that the magistrate had no jurisdiction because no notice such as is required by sec. 70 was served prior to the making of the order, it appeared that the summons mentioned in subsec. 3 was served upon one D., who was sworn to be the owner of the premises where the liquor was found, but was said by B. to be merely a tenant:—*Held*, assuming that D. was merely a tenant, that he was the "owner" for the time being of the land on which the liquor was found, within the meaning of subsec. 4; and therefore the magistrate had jurisdiction.

The word "owner" has no definite legal meaning.

York v. Township of Osgoode (1893), 24 O.R. 12, 15, applied and followed.

This was an application to quash an order dated the 21st October, 1921, made by J. J. A. Weir, Police Magistrate for the City of Kitchener, forfeiting to His Majesty certain intoxicating liquor claimed by the applicant, on the ground that the said magistrate had no jurisdiction to make the order.

December 23. The motion was heard by MASTEN, J., in Chambers.

G. M. Garvey, for the applicant.

F. P. Brennan, for the magistrate.

December 30. MASTEN, J.:—The objection as to want of jurisdiction is based on the ground that no notice such as is required by sec. 70 of the Ontario Temperance Act was served prior to the making of the order.

The depositions taken before the magistrate shew that the liquor in question was found in the garage at the home of Ezra Karcher, 10 Homewood avenue, in Kitchener, on the 26th July, 1921, and that the summons pursuant to which the order in question was made was served on one J. B. Dennis, who is sworn to be the owner of the premises where the liquor was found. Counsel for the applicant sought leave to file affidavits shewing that Dennis was not the owner at the time the summons was served but was a tenant.

Without determining the question whether evidence can be

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given in such a case to controvert what is shewn by the record, I am of opinion that, whether Dennis is the owner of the legal estate in the premises or is a tenant, he comes within the scope of subsec. 4 of sec. 70 of the Ontario Temperance Act. That subsection provides as follows:—

“(4) It shall be sufficient service of the summons if the same is delivered to the shipper, consignee or owner, or be left with some grown-up person at the express office, railway station or other place in which the liquor is found or to the owner of the lands on which the same is found.”

It was said by the Divisional Court per Armour, C.J., in the case of *York v. Township of Osgoode* (1893), 24 O.R. 12, at pp. 25 and 26:—

“The term ‘owner’ has no definite legal meaning, and has been construed differently in different Acts of Parliament in which it has been used, and has been so construed to meet the intention of the legislature as gathered from the particular Act in which the term has been used.

“In Stroud’s Judicial Dictionary it is said that ‘the owner of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct of it:’ and numerous cases are referred to as shewing the meaning attached to the term under various Acts of Parliament. See particularly *Lewis v. Arnold* (1875), L.R. 10 Q.B. 245; *Woodard v. Billericay Highway Board* (1879), 11 Ch. D. 214.

“There are several cases in our own Courts where the meaning of the term has been discussed, as in *Conway v. Canadian Pacific Railway Co.* (1885), 7 O.R. 673; *Hopkins v. Provincial Insurance Co.* (1868), 18 U.C.C.P. 74; *Lyon v. Stadacona Insurance Co.* (1879), 44 U.C.R. 472.

“The defendant George Comrie was at least a tenant at will, and as such was an owner affected or interested within the meaning of the Act, and was making himself liable as such for the proportion of the work he might be awarded to perform.”

Having regard to the general object and scope of the Ontario Temperance Act, namely, to prohibit and prevent the sale of liquor, and having regard to the other subsections of sec. 70,*

*70.—(1) Where an inspector . . . or officer finds liquor in transit or in course of delivery upon the premises of any railway company . . . and believes that such liquor is to be sold or kept for sale or otherwise in contravention of this Act, he may forthwith seize and remove the

(2) Any inspector . . . or officer, if he believes that liquor intended for sale or to be kept for sale or otherwise in contravention of this Act, same . . .

I am of opinion that, whether Dennis was the owner of the legal estate or was only a tenant, he was at the time of the service of the summons "a person in whom (with his . . . assent) the property was for the time being beneficially vested, and who had the occupation, or control, or usufruct of it."

The application is therefore refused with costs.

[APPELLATE DIVISION.]

MCNEIL v. NORTH AMERICAN LIFE ASSURANCE CO.

Insurance (Life)—Delivery of Policy and Official Receipt for First Premium—Acceptance of Promissory Note for First Premium—Non-payment at Maturity—Renewal Notes Accepted by District Manager of Insurance Company—Death of Insured when Renewal Current—Whether Insurance Contract in Force—Ontario Insurance Act, sec. 159—Effect of subsec. 4—Election to Terminate Contract—Necessity for—Evidence—Waiver—Authority of District Manager.

In an action by the administrator of the estate of M., deceased, to recover the amount of an insurance policy issued by the defendants, insuring the life of M., it was admitted that the policy was delivered; that the defendants accepted a promissory note as payment of the first premium; and, with the policy, delivered a receipt for the premium, dated the 4th December, 1919. The promissory note fell due on the 8th November, and was not paid. About the 18th November, M. gave the defendants' district manager a renewal note, which fell due on the 20th January, 1920. This note was not paid at maturity, but on the 4th February M. gave the district manager a renewal note dated the 20th January and due the 22nd February. M. died on the 20th February:—

Held, that the policy was not void at the date of the death of M., but was in full force and effect.

The rights of the parties were governed by sec. 159 of the Ontario Insurance Act, R.S.O. 1914, ch. 183; and, by reason of the provisions of that section and the delivery of the official receipt, it must be considered that the first premium, *quâ* premium, was paid and that the defendants' rights on default in payment of the note were limited to such rights as are given by subsec. 4 of sec. 159.

Subsection 4 provides that where the premium is paid by a promissory note and the note is not paid at maturity the contract shall at the option of the insurer be void; the meaning is that the

. . . . is concealed upon the land of any person may enter upon and search such land and seize and remove any liquor found there

(3) Where liquor has been seized under subsection 1 or subsection 2, the person seizing the same shall give information under oath before a Justice of the Peace, who shall thereupon issue his summons directed to the shipper, consignee or owner of the liquor if known, calling on him to appear at a time and place named in the summons and shew cause why such liquor should not be destroyed or otherwise dealt with as provided by the Act.

(7) If no person claims to be the owner of the liquor, or if the Justice disallows such claim, and finds that it was intended that such liquor was to be sold or kept for sale or otherwise in contravention of this Act he may order that such liquor shall be forfeited to His Majesty

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contract of insurance shall continue in force after default until such time as the insurer by some act or notice shall terminate it; and it was not shewn that the defendants in fact made an election and communicated it to M.; the oral communications of the district manager to M., if made, should not be considered as establishing more than that he advised M. as to the meaning and effect of the stipulations in the policy.

If it were necessary for the plaintiffs to shew that the defendants waived the benefit of subsec. 4, that had been established.

In the absence of express notice or contract limiting the authority of the district manager, he had at least ostensible authority to receive payment of notes taken by the defendants in lieu of cash, and to extend the time for payment, and thus waive default, and he did so. The evidence did not establish that he accepted either of the renewal notes conditionally.

Review of the authorities.

Judgment of KELLY, J., reversed.

ACTION by the administrator of the estate of Arthur E. McNeil, deceased, to recover from the defendants \$1,000, the amount of a policy of insurance of the life of the deceased, issued by the defendants.

The action was tried by KELLY, J., without a jury, at Goderich.

Charles Garrow, for the plaintiff.

John A. Paterson, K.C., for the defendants.

August 9. KELLY, J.:—By a policy of life assurance number 110220 bearing date the 22nd August, 1919, the defendants insured the life of Arthur E. McNeil in the sum of \$1,000, for an annual premium of \$36.15, to be paid in advance at the defendants' head-office in Toronto on the delivery of the policy, and thereafter on the 20th August in every year until 20 full years' premiums should be paid or until the earlier death of the insured.

The insured died on the 20th February, 1920, and on the 25th March, 1920, letters of administration of his estate were granted by the Surrogate Court of the County of Huron to his brother, the plaintiff, Charles McNeil, who, on the 20th August, 1920, commenced this action to recover from the defendants \$1,000 and interest thereon from the 12th May, 1920, the date on which, the plaintiff alleges, he furnished the defendants with due and sufficient notice and proof of the death of the insured.

The defendants resist payment on the ground that the insured did not pay the premium required in consideration for the issuance of the policy; and they set up non-compliance by the insured with the terms and conditions of the contract.

In the insured's application for insurance of the 7th August,

1919, it is stated that the policy to be issued shall not be in force until actual payment of the first premium due thereon and its acceptance by an authorised agent of the company and the delivery of the company's official receipt during the applicant's lifetime and good health; and also that, if a note, cheque, draft, or other obligation be given for the first or any subsequent premium or any part thereof, and the same be not paid at maturity, the policy shall, subject to its terms and privileges, be null and void, but such obligation must nevertheless be paid. The policy which followed was issued subject to certain provisions, privileges, and agreements, including the following:—

“(a) Under no circumstances shall this policy be held to be in force until actual payment of the whole premium thereon to an authorised agent of the company, and its acceptance by him, and until the delivery to the applicant, when in the same condition of health as stated in the application for this policy, of the official receipt, signed by the managing director, actuary, and secretary or assistant-secretary.

“(b) Payment of premiums to agents will not be valid unless receipts are given, signed by one of the said executive officers. When receipts are sent to agents for delivery, such agents shall countersign and date the same *only on the day of the actual* payment of premium, and as evidence of its then payment to them. All premiums are due and payable at the head-office in Toronto. For the convenience of the insured, payment of a premium, *when not overdue*, may be made to an agent, but only upon production of the receipt above specified.

“(c) One month, not less than 30 days, will be allowed for payment of each renewal premium on this policy after the same has become payable, during which time the policy will continue in force.

“(d) If a note, cheque, draft, or other obligation, given for the first or any subsequent premium, or any part thereof, or any renewal of any such note or other obligation or part thereof, be not paid when due, this policy, subject to the automatic non-forfeiture provision hereof, will thereupon cease to be in force, without any notice or act on the part of the company.

“(e) If, in the event of default in the premium payments, the original policy shall not have been surrendered to the company and cancelled, the policy may be reinstated at any time, upon receipt at the head-office of evidence of insurability satisfactory to the company and of arrears with compound interest at a rate not exceeding 6 per cent. per annum.”

“(k) No provision of the contract can be changed, waived, or modified, nor can any permit be granted, except by written

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agreement, signed by the president or a vice-president, and the managing director, actuary, secretary or assistant-secretary of the company."

At the trial the plaintiff produced the defendants' receipt of the 4th September, 1919, for \$36.15 for the first premium, "subject to all the provisions of the said policy and those on the back hereof hereby incorporated herein." On the back of the receipt it is stated that premiums are due at the company's head-office at the date named in the policy, but authorised persons may receive such premiums on the production of the company's receipt therefor signed by the president or secretary; that no payment of a premium made, except in exchange for such receipt, will be recognised by the company as valid payment; and that agents of the company have no authority to waive any of the conditions of the policy or to accept payment of premiums except as provided for in the terms of the policy. This receipt was found amongst the insured's papers after his death.

The premium represented by this receipt was not paid in cash, but by the assured's promissory note due on the 7th November, 1919, which was delivered on or about the 8th September, 1919, to Oettinger, the defendants' district manager at London, who took McNeil's application for the insurance, and who at the time of the delivery of the note delivered to the insured the policy and the premium receipt.

Before maturity of the note, notice was sent to the insured reminding him of approaching maturity and that on the terms of the policy contract it was essential that remittance be received not later than the date of maturity. There was no reply to this notice.

On the 12th November, 1919, Oettinger told the insured that the policy was not in force, and that he did not know if the defendants would accept a promissory note unless something were paid on account. Nothing was then paid.

On the 18th November, Oettinger sent to the insured a new note for \$36.30, bearing interest at 6 per cent. per annum and maturing on the 20th January, 1920. The insured signed this note and returned it to Oettinger, who sent it on to the defendants for approval. Approval was refused, and then Oettinger communicated by telephone with the insured and told him some cash would be necessary; this was not complied with.

On the 16th December, Oettinger went to the insured's residence near Goderich, and again informed him that the policy was not in force, and left with him the defendants' form No. 23—an application for reinstatement of policy—which the insured

promised to sign, and a blank form of promissory note for him to complete and sign in the event of his paying anything on account of the premium. Neither the application nor the note was signed, but Oettinger in the same month sent to the defendants' head-office \$10 of his own money. There does not seem to have been any bargain that this should be done.

After the due date of the note of the 18th November, the insured sent to Oettinger another note dated the 20th January, 1920, for \$26.65, with interest at 6 per cent. per annum and maturing on the 22nd February, 1920; this Oettinger forwarded to the defendants' head-office, but the defendants refused to accept it and returned it to Oettinger on the 10th February. Between the 20th January and the 30th January, the insured telephoned to Oettinger that he would send some money; but he did not keep this promise. On the 30th January, Oettinger wrote the insured, and, referring to their 'phone conversation, said he was still waiting for his cheque for \$36.65, and that should the insured not be able to pay the amount at the present time "we will be pleased to renew your note for you but would ask you to kindly let me know what you intend to do in the matter." The insured replied to Oettinger (on the 4th February), "I am sorry but money did not come as I expected it to, so will have to ask you to extend time for another month." This communication of Oettinger was of his own accord, without the knowledge or consent of the defendants, and was not afterwards approved or affirmed.

The defendants' attitude is shewn by the letter of the 10th February (already referred to) from their actuary to Oettinger, as follows:—

“Re Policy No. 110220.

“We are returning herewith note No. 511 due on the 26th of February, 1920, unaccepted. It will be necessary to have a short medical examination properly completed before we can give the matter of reinstatement our further consideration.

“Kindly collect the equivalent to term rate insurance from the 20th of August to the 22nd of February, 1920, when making application.”

On receiving this, Oettinger went to Goderich and on the 12th February made ineffectual attempts to communicate by telephone with the insured, and, failing in this, his evidence is that he then wrote the insured a letter, a copy of which he produced at the trial, and on the same afternoon or evening posted it at Goderich. The plaintiff says that this letter was not found amongst the deceased's papers, and evidence was submitted intended to shew that it did not reach him, but which

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is not conclusive, there being a possibility of his having received it. It contained notice of the head-office's refusal to accept his note and requiring him to be medically examined before reinstatement could be made, and that payment of at least \$15 on account was required, etc. Much importance has been attached to whether the insured did receive this letter; but I do not think the merits of the defendants' case depend on whether the letter reached the insured, however much it may be corroborative or explanatory of the defendants' attitude throughout.

The insured's attention was expressly drawn by the application and the policy to the consequences of non-payment at maturity of the premium note—that the policy became void. He was warned before the first note matured of the necessity of prompt payment. Over and over again he was told, after dishonour of the first note, that the policy was not in force. He had previously held a policy of this same company in respect of which the question of reinstatement had arisen, and he was familiar with the requisites for reinstatement. His contract expressly provided that no provision of it could be changed, waived, or modified, except by written agreement signed by the president or a vice-president, and the managing director, actuary, secretary or assistant-secretary of the company. No such written agreement was obtained, and the importance sought to be attached by the plaintiff to Oettinger's letter of the 30th January—Oettinger not holding any of these positions or offices—is without weight. Oettinger had no authority or power to bind the defendants to accept notes or otherwise waive the plain terms of the contract; and, with the knowledge the insured undoubtedly had or should have had of the necessity of contracting directly with or obtaining the consent, confirmation, or approval of the defendants, he could not reasonably have assumed that any negotiations with Oettinger could possibly be binding until so adopted or confirmed.

It is well-established by the evidence that the policy lapsed on the 7th November, 1919, and that, though conditions on which it could be revived were distinct, and the insured's knowledge of these undoubted, the requisite conditions to that end were not complied with, and the policy was not revived and was not in force at the death of the insured. Decisions are not necessary on which to form that conclusion, but cases in our Courts are not wanting to support the defence. In *Foxwell v. Policy Holders Mutual Life Insurance Co.* (1918), 42 O.L.R. 347, 43 D.L.R. 720, it was declared that the policy there in issue had lapsed and that the onus was on the plaintiff to shew that it was revived; and that she was confronted with abundance of

notice of the conditions upon which it alone could be revived. In the present case the plaintiff is in the same situation and is confronted with the same difficulty.

If importance is attached to any demand made after maturity of the first premium note for payment thereon, it is explainable by reference to the terms of the application—expressly made part of the policy—that the obligation on the note for payment continues notwithstanding the lapse of the policy for non-payment of the note at maturity. Where a condition in a policy of life insurance provided that if any premium, or note, etc., given therefor, was not paid when due the policy should be void, it was held that where a note given for such premium was partly paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void; and also that a demand for payment after maturity of the renewal was not a waiver of the breach of the condition which would keep the policy in force: *McGeachie v. North American Life Assurance Co.* (1894), 23 Can. S.C.R. 148, affirming the decision of the Court of Appeal (1893), 20 A.R. 187. See also *Manufacturers' Life Insurance Co. v. Gordon* (1893), 20 A.R. 309.

In dismissing the action, it is with some hesitation I award costs against the plaintiff. The defendants, in retaining the notes which they refused to accept for the premium, fell into an objectionable practice sometimes followed elsewhere. On refusing the notes, it was their duty—and the good faith which should prevail in such cases so required—to return them; the reason given by the defendants' secretary is not a justification for retaining them. The plaintiff came into the transaction as the legal personal representative of the insured, and without the knowledge possessed by the insured of what had taken place between the latter and the defendants, and, in a desire to perform his duty as administrator, he may have innocently attached to these notes more importance than the circumstances really warranted. It is possible that this may have been a factor in bringing about the action. The defendants might well consider the advisability of not exacting costs.

The plaintiff appealed from the judgment of KELLY, J.

November 24. The appeal was heard by MACLAREN and HODGINS, JJ.A., MIDDLETON, J., FERGUSON, J.A., and ORDE, J. *Garrow*, K.C., for the appellant.

Paterson, K.C., for the defendants, respondents.

The arguments and authorities are sufficiently referred to in the judgment.

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December 30. The judgment of the Court was read by FERGUSON, J.A.:—Appeal by the plaintiff from a judgment of Kelly, J., dismissing the plaintiff's claim to recover on a life insurance policy. The plaintiff sues as administrator of the estate of the insured.

In his reasons for judgment the learned trial Judge did not mention the Insurance Act, R.S.O. 1914, ch. 183, and apparently determined the rights of the parties by reference only to the words of the policy. The appellant contends that the provisions of the policy relied upon by the company are inconsistent with and are overridden by sec. 159 of the Insurance Act, which provides:—

“(1) Where the contract of insurance has been delivered it shall be as binding on the insurer as if the premium had been paid, although it has not in fact been paid, and although delivered by an officer or agent of the insurer who had not authority to deliver it.

“(2) The insurer may sue for the unpaid premium and may deduct the same from the amount for which he may become liable under the policy or contract of insurance.

“(3) This section shall have effect notwithstanding any agreement, condition or stipulation to the contrary.

“(4) Where the premium is paid by a cheque or a promissory note, and the cheque is not paid on presentation or the promissory note at maturity the contract shall at the option of the insurer be void.”

[The learned Judge then set out the provisions of the policy and application relied upon by the respondents, which are also set out in the judgment of KELLY, J., *supra*.]

It is admitted that the policy was delivered; that the company accepted a promissory note as payment of the first premium; and, with the policy, delivered a receipt for the premium which reads:—

“North American Life Assurance Company.
Head Office, Toronto, Ont.

“First premium \$36.15.

“Sum insured \$1,000.

“Received this 4th day of September, 1919, thirty-six.... 15/00 dollars, for the first premium on policy No. N.110220 on the life of Arthur E. McNeil, subject to all the provisions of the said policy, and those on the back hereof, hereby incorporated herein.

“This policy is not valid or operative unless this receipt is countersigned by the agent of the company, on the actual date of payment within 30 days of the issue of the policy, the

life insured being then as stated in the application for the policy.

“L. Goldman,

“President and Managing Director.

“August Oettinger, Agent at London.”

The promissory note fell due on the 8th November, and was not paid. Subsequently, about the 18th November, the deceased gave to the district manager of the defendant company a renewal note, which fell due on the 20th January. This note was not paid at maturity, but on or about the 4th February the deceased gave to the district manager a renewal note dated the 20th January and due the 22nd February. The insured died during the currency of this note, that is, on the 20th February.

Relying on provision (d) of the policy, the learned trial Judge held that default terminated the policy without any notice or act on the part of the company, and that the policy could not again be made effective unless reinstated as provided by provision (e), or unless these provisions were waived, changed, or modified in manner provided for by provision (k).

The appellant contends that the acceptance by the company of the promissory note, and the delivery of the official receipt and policy, estopped the defendant company from asserting that the premium, *quâ* premium, had not been paid, and prevented the company from setting up and relying upon the provisions of the contract referring to default in payment of that premium, such as provisions (b), (e), and (k), and limited the rights and remedies of the company for non-payment of the note to such as are given by subsec. 4 of sec. 159; that, according to the true intent, meaning, and effect of subsec. 4, the policy did not on default terminate, but remained in force until such time as the company exercised the option to terminate, and that the company did not, after the default, elect one way or the other, or, if they did so elect, did not communicate their election to the insured; but, on the contrary, the company, by receiving and accepting renewal notes, elected to waive the default and extend the time for payment so as to prevent themselves from again electing until after the renewal notes fell due.

To establish the acceptance of renewal notes and waiver by the company, the appellant relied upon transactions and dealings between the insured and the company's district manager: the respondents contend and the learned trial Judge held that, if the district manager did accept the notes, he had not authority to waive the effect of the default stipulated for by provision (d), holding that that provision could only be changed, waived, or altered by the officers named in provision (k).

The respondents contend that, even if the district manager

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had authority to waive the effect of the default, what he did, did not in the circumstances amount to a waiver, in that the evidence establishes that he accepted the notes on the condition that the insured would apply for reinstatement and be reinstated, and that if the company were bound to elect to terminate the policy, they did so elect in that the district manager notified the insured that the policy was void or terminated, and could not be reinstated except in manner provided for by the policy, and they rely on the verbal testimony of the manager, and a letter dated the 12th February. The appellant says that this letter was not received by the insured, and the oral statement of the district manager did not amount to notice of an election to terminate, but was really only an expression by the district manager of his opinion as to the effect of the terms of the policy; and that, if such oral notice should be interpreted as a communication of an election by the company, in any event the district manager's evidence is so inconsistent with the letter of the district manager to the insured, dated the 30th January, that it should not be accepted as reliable or as sufficient evidence of the facts sought to be established against the deceased person, within the meaning of sec. 12 of the Evidence Act, R.S.O. 1914, ch. 76.

I am of opinion that the rights of the parties are governed by sec. 159 of the Insurance Act, and that by reason of both the provisions of this section and the delivery of the official receipt, it must be held that the first premium, quâ premium, was paid, and that the company's rights on default in payment of the note are limited to such rights as are given by subsec. 4 of sec. 159.

That brings me to the question: What is the meaning and effect of subsec. 4? Does it mean that the contract of insurance shall continue in force after default until such time as the company by some act or notice terminate it, or that the policy is void and terminated unless and until the company by some act elect to continue it by waiving the benefit of the provision?

The appellant contends for the first proposition, the respondent for the second, and the respondent relies on *McGeachie v. North American Life Assurance Co.*, 20 A.R. 187, 23 Can. S.C.R. 148; *Manufacturers' Life Insurance Co. v. Gordon*, 20 A.R. 309; *Frank v. Sun Life Assurance Co. of Canada* (1893), 20 A.R. 564, 23 Can. S.C.R. 152; *London and Lancashire Life Assurance Co. v. Fleming*, [1897] A.C. 499.

Those cases seem to me to establish that, where notes are given and accepted in payment of a premium, and the policy, the note, or the application stipulates that on default in payment of the note the policy shall be forfeited, terminated, or voided,

the policy stands forfeited, terminated, or void until and unless the company waives the forfeiture. I think these cases were determined on the principle that the words used in the contract mean what they say, and that consequently on default the contract is forfeited, terminated, or void, according to the words of the document, but that, notwithstanding the primary meaning of the words, the person in default cannot set up or rely on his own wrong or default so as to secure himself an advantage by avoiding the contract. On the other hand, if the default or other happening on which a forfeiture occurs is not the result of a wrong or a breach of contract, for which the party in default is responsible, both parties may take advantage of the stipulation, but either party, who is not in default, may elect to waive or forego any advantage that accrues to him by the stipulation. See *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*, [1919] A.C. 1, and *In re Meyrick's Settlement*, [1921] 1 Ch. 311.

In the reasons for judgment in support of the decisions cited and referred to, one or more of the learned Judges expressed the opinion that it made no difference whether the provision was interpreted to mean that the contract was void or voidable, but I do not think that is the real meaning and effect of the decisions.

I have read and considered the opinions and the conclusions in the several authorities cited by counsel, and those I have referred to, and particularly the rule of interpretation laid down by Lord Wrenbury in the *New Zealand* case, where he says (p. 15) :—

“The rule is that in a contract ‘void’ is to be read ‘voidable,’ if the result of reading it as ‘void’ would be to enable a party to avail himself of his own wrong to defeat his contract. It may be stated either in the form that if one party is in default it is ‘void as against him,’ or that if one party is in default it is ‘voidable at the option of the other party.’ The two amount to the same thing. But the contract is not ‘void’ in favour of or ‘voidable at the option of’ the party in default. He cannot say that it is void, and has no option of avoiding it in his own wrong. Here the contract is, in my opinion, voidable at the option of either party provided always that he is not seeking to avoid it in his own wrong.”

I am not satisfied that the learned law Lords have determined or intended to determine that, if the contract read “shall be voidable or void at the option of one party,” instead of “void

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or forfeited," the contract would terminate before or unless or until the party having the option did elect to avoid.

The appellant contends that sec. 159 was enacted to change the law laid down by the cases relied upon by the respondents, and to require the company to elect. I do not think we can speculate as to the reason for enacting sec. 159; but, after anxious consideration of the authorities and the wording of the Act, I am of the opinion that, according to the true intent and meaning of the Act, the company must, after default, elect to avoid, and that unless and until such election is made and communicated, the policy remains in force: *Roberts v. Davey* (1833), 4 B. & Ad. 664; May on Insurance, 4th ed., p. 725, para. 342; and the question remains: Did these defendants elect and communicate their election to the insured? It seems clear that the company and its officers were all of the opinion that the rights of the parties were governed by the stipulations in the contract, and that it was not necessary to make an election; that therefore their mind was not directed to making an election; that they did not mean to make an election; and that they did not in fact do so; and, consequently, did not authorise their district manager to communicate an election: that the oral communications of the district manager to the insured, if made, should not be considered as establishing more than that he advised the insured as to the meaning and effect of the stipulations in the policy.

For these reasons, I am of opinion that the policy was not void at the date of the death of the insured, but was in full force and effect. If I be wrong in this, and it was necessary for the plaintiff to shew that the company waived the benefit of subsec. 4 of sec. 159, I am of the opinion that this has been established. It appears to me that a waiver of the benefits conferred by subsec. 4 cannot be said to be a waiver of a provision of the contract within the meaning of proviso (k) of the policy, and that the delivery of the policy and the receipt estopped the company from setting up or relying upon provisos (b) and (e) for the purpose of establishing notice of a limit to the ostensible authority of the district manager.

This brings me to the questions: Had the district manager actual or ostensible authority to receive payment of notes taken by the company in lieu of cash, or to extend the time for payment thereof, and thus waive default, and did he do so? The evidence is that the district manager, having been entrusted with the possession of the original note, asked for and received the renewal note of the 18th November, and sent it to the head-

office, but they returned it to him with a letter reading:—

“November 27th, 1919.

“A. Oettinger, Esq., District Manager, London, Ont.

“Dear Sir:—

Re Policy 110220, McNeil.

“We return herewith note given in connection with the above mentioned policy. Before accepting this note, it will be necessary for us to have the equivalent cost of insurance.

“Yours truly,

“W. B. Taylor, Secretary.”

After receiving that letter, Oettinger sent to the head-office the equivalent cost of insurance, and the company retained it. It is not clear that he also returned the renewal note, but it is clear that, about the time the renewal note fell due, Oettinger sent or gave to the insured a form of renewal note, but the insured did not sign it promptly, whereupon Oettinger wrote him the following letter:—

“London, Ont., January 30th, 1920.

“Arthur E. McNeil, Esq.,

“R.R. No. 5, Goderich, Ontario.

“Dear Sir:—

Re Policy No. N.110220.

“Referring to your 'phone conversation I would say that I am still waiting for your cheque for \$36.65. Should you not be able to pay this amount at the present time we will be pleased to renew your note for you, but would ask you to kindly let me know what you intend to do in the matter.

“Yours truly,

“August Oettinger,

“District Manager.”

The reply is endorsed on the manager's letter, and reads:—

“Goderich, Feb. 4th, 1920.

“Dear Sir:—

“I am sorry but money did not come as I expected it to, so will have to ask you to extend it for another month, thanking you for your kindness.

“Yours truly,

“A. McNeil.”

With that reply, or about the same time, the district manager received the last renewal note dated back to the 20th January, to agree with the due date of the former note.

It will be noticed that the letter requesting payment offers to take a renewal note unconditionally, but the agent endeavoured to shew that the acceptance of the note was to be condi-

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tional on the insured applying for reinstatement, and submitting to a medical examination, and he endeavours to make out this condition by oral testimony, and by a letter of the 12th February. I do not think that the evidence establishes that this letter was ever received by the insured, and I do not think that the uncorroborated testimony of the district manager, seeking to contradict or to vary his letter of the 30th January, should be received as sufficient to make out the condition as against the deceased or his estate; and, in rejecting that evidence as insufficient, I think I am justified by the spirit if not by the letter of sec. 12 of the Evidence Act; but, even if the oral testimony of Oettinger does not require corroboration because he is not a party to the litigation, I do not think that it establishes the accepting of either of the renewal notes conditionally. Oettinger had control and possession of and delivered up the original note in exchange for the renewal note dated the 18th November. That, I think, was an unconditional extension of the time for payment. His testimony is that it was not until some time in December, and after the receipt by him of the secretary's letter of the 27th November, that he asked for anything additional. It seems to me that the time had then passed for attaching a condition to the acceptance of the note of the 18th November, or for claiming that the original note which had been delivered to the insured was unpaid. See *Ætna Life Insurance Co. v. Sanford* (1901), 98 Ill. App. 376, affirmed (1902), 197 Ill. 310, 200 Ill. 126. Then, does the evidence establish that the second renewal, dated the 20th January, was received and accepted by Oettinger conditionally, or does the evidence go farther than to establish that prior to that date Oettinger had expressed the opinion that the policy was void, and could not be reinstated except in manner provided for by the policy, and that his letter of the 30th January was an offer to accept a renewal note unconditionally? According to the testimony, the insured thought the policy was in force, and the note had been accepted; and I think the evidence is that, so far as he was entitled to do so, Oettinger intended to accept the renewal note of the 20th January unconditionally. Even in the letter of the 12th February, which Oettinger says he wrote, and which was not, I think, received by the insured, Oettinger does not say that he received the note subject to a condition. He merely notifies or advises the insured that the head-office will not accept it. He says: "I have received notice from the head-office that your note has not been accepted," etc., which is an entirely different thing from saying, "I did not accept your note," or "I accepted it conditionally."

As to the effect of such a notice or advice as Oettinger deposits to, and the subsequent acceptance of a payment, see *Davenport v. The Queen* (1877), 3 App. Cas. 115, at p. 132.

The question remains: What was the ostensible authority of the district manager? The title "district manager" conveys to my mind the impression that the person so designated is the manager of the company's affairs in reference to its transactions in the district over which he is manager. The company entrusted him with the original note and with the renewals, and, when a dispute arose, the general manager wrote the district manager for the notes and correspondence.

In the absence of express notice or contract limiting Oettinger's authority as district manager, I think it should be found that a person designated and held out by the company as being their district manager, when entrusted with a note in reference to a policy taken in the district over which he is manager, had at least ostensible authority to deal with that note by receiving payment or renewing it: *Moffatt v. Reliance Mutual Life Assurance Society* (1881), 45 U.C.R. 561.

I would allow the appeal.

Appeal allowed with costs.

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Mines and Mining—Order of Mining Commissioner Relieving Recorded Holder from Forfeiture of Claim—Extension of Time for Doing Work "until the 1st Day of July"—Whether Inclusive or Exclusive of Day Named—Intention of Commissioner—Restaking by Strangers on 1st and 2nd July respectively—Interpretation of Order—Reasons for Decision of Commissioner—Amendment of Order so as to Express Intention—Revesting of Claim after Forfeiture—Whether Relief Conditional or Unconditional—Priority in Restaking—Mining Act of Ontario, R.S.O. 1914, ch. 32, secs. 68, 84, 85, 139 (2).

Upon the application of H., the recorded holder of a mining claim, the Mining Commissioner, on the 7th February, 1921, made an order, by one clause of which he directed "that the time for the performance of the deficiency of the work upon the said claim . . . be extended until the 1st day of July next:"—

Held (FERGUSON, J. A., dissenting), that the order should be interpreted as including the whole of the 1st day of July in the time allowed for performance.

On the 1st July, 1921, S. restaked the claim and sought to record his application therefor; and on the following day R. (on behalf of M.) staked the same claim and recorded his application therefor. The Mining Recorder refused S.'s application, holding that the claim was not open for restaking on the 1st July. This was reversed by the Mining Commissioner, who stated that his intention, when making the order of the 7th February, was that the work should be performed by the end of June:—

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Held (FERGUSON, J. A., dissenting), reversing the order of the Mining Commissioner, that the order of the 7th February, 1921, could not be amended or treated as saying something other than its actual words imported.

Per MACLAREN, J. A.:—The contest was not one between the original discoverer and the Crown. Strangers to the original application were called upon to act on the recorded order and were justified in acting upon it according to its very letter. What was sought was to deprive one who interpreted it correctly of rights which he acquired, by reason of something of which he had no knowledge—the intention of the Commissioner to use words in a peculiar and unnatural sense.

The Commissioner did not proceed in accordance with sec. 139 (2) of the Mining Act of Ontario in giving his reasons for his decision.

Review of the authorities.

Per FERGUSON, J. A.:—The effect to be given to the word “until” must depend upon the intention of the parties using it, as manifested by the context and considered with reference to the subject to which it relates (39 Cyc. 841). The 1st day of July should be excluded from the time allowed for completion of the work, unless the context, considered in reference to the subject-matter and the surrounding circumstances, shewed that the person using the word intended to include that day; and there was nothing in the context, in the Mining Act of Ontario, or in the surrounding circumstances, to shew that intention; indeed the Commissioner himself said that his intention was the opposite.

If the order as issued does not express the intention of the Judge or officer who pronounced it, or is ambiguous, it may be changed to express the real intention. This power is inherent in the tribunal by which the order is pronounced; and, in view of it, and the provisions of secs. 139 and 140 of the Mining Act, which give the Commissioner power to act on his own knowledge, there was no reason for refusing to act on the statement of the Commissioner as to his intention.

Ever if the order of the 7th February, 1921, was to be read so as to give H. the whole of the 1st day of July to do his work, yet the claim was not vested in H. between the 7th February and the 2nd July: under the provisions of sec. 84 of the Act, it was a forfeited claim and open for staking; the Commissioner had the power, under sec. 85, to relieve H. from the forfeiture. He relieved upon terms, and H.'s right to the claim was not revested unless and until he did the work. Consequently, either of the claimants could have restaked at any time before the work was done; S. was the first to restake; and, as H. did not do the work, S.'s staking should be recorded.

Per HODGINS, J.A.:—Under sec. 68 of the Act, the recording of a claim gives the person recording it the status of a licensee of the Crown with the right to proceed to obtain a certificate of record and a patent from the Crown. If a loss of these rights occurs, by reason of the work prescribed in the statute not having been duly performed, the Commissioner may, under sec. 85, make a relieving order, and may make it without conditions. The doing of the work was not in this case made a condition precedent to the revesting—the Commissioner reinstated the claim and then extended the time for the work.

AN appeal from a decision of the Mining Commissioner for Ontario.

The facts are stated in the reasons for the decision of the Commissioner, dated the 1st December, 1921, as follows:—

Upon the application of Edward Hargreaves, the recorded holder of mining claim L.8200, situate in the township of Label, in the Larder Lake Mining Division, I issued an order on the 7th February, 1921, a clause of which reads as follows:—

“And I further order that the time for the performance of the deficiency of the work upon the said claim L.8200 be extended until the 1st day of July next.”

The deficiency of work was not fully performed as ordered; and on the 1st July, 1921, W. H. Smith restaked the claim and sought to record his application therefor. The Mining Recorder held that under my order the time for performing the work would not expire until the end of the 1st day of July, and consequently the land was not open for staking on that day. Homer Racicot staked the same land on the 2nd July and recorded his application. On the 15th July, W. H. Smith instituted an appeal from the decision of the Mining Recorder refusing Smith's application for the recording of the staking of the 1st July.

The sole issue before me upon the appeal is, was the land open for staking on the 1st or not until the 2nd July?

In computing time for an act or event, there is no general rule that the day mentioned is to be inclusive or exclusive—it depends on the reason of the thing according to the circumstances: *Lester v. Garland* (1808), 15 Ves. 248. Whether the computation is to be made inclusive or exclusive of the first mentioned or last mentioned day, regard must be had to the context and to the purposes for which the computation has to be made. Where there is room for doubt the enactment or instrument ought to be so construed as to effectuate and not to defeat the intention of Parliament or of the parties as the case may be: Halsbury's Laws of England, vol. 27, p. 446.

In *Backhouse v. Mellor* (1859), 28 L.J. Ex. 141, Watson, B., at p. 142, said: “The word ‘until’ is ambiguous, and may be construed either inclusive or exclusive of the day mentioned, according to the subject-matter and true intent of the document in which it is used.” See also *S.C., sub nom. Bellhouse v. Mellor*, 4 H. & N. 116, 124, 125.

Nichols v. Ramsel (1678), 2 Mod. 280, was considered by Lord Ellenborough, C.J., in *Rex v. Stevens and Agnew* (1804), 5 East 244, at p. 255: “On the other side . . . it is contended, on the authority of *Nichols v. Ramsel*, 2 Mod. 280, . . . that in legal proceedings the word ‘until’ must have an exclusive sense; and it has been argued from the analogy it bears

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the word 'unto' (which word generally bears the same relation to place which 'until' does to time) that the case of *Rex v. Inhabitants of Gamlingay* (1790), 3 T.R. 513, is to be considered as authority to the same effect, These words, however, have obtained, in ordinary use, an equivocal sense at least, of which many instances were given at the bar."

The American authorities give the word "until" an exclusive or inclusive meaning according to the subject-matter being construed, and are not, nor are other authorities cited, conclusive or binding on me in determining the meaning to be given this word in the order referred to.

The recorded holder, who secured the extension order, was not in doubt as to when his extended term expired, and understood the work must be performed by midnight of the last day of June. The intention of the order was that the work should be performed by the end of June. The word "until," as used, was the equivalent of "unto," "as far as," and not meant to be inclusive of the day named, when the protection ceased.

In determining the time within which an act should be performed pursuant to the requirements of the Mining Act of Ontario, it has been the rule to exclude the first and include the last day; but the reasoning behind the adoption of that rule does not apply here, as the only doubt is, was the day named for the conclusion of the work to be treated as inclusive, or as a time or period of demarcation between the performance of the work and a forfeiture for the non-performance?

It will be noticed that in the prescribed form for a miner's license (form 1) the words used are, "to be in force until and including the 31st day of March." With intent the word "until" was not used in this form in a restrictive sense or as a word of limitation.

Having a personal knowledge of the true intent of the clause of the order in question, and the recipient of the order being in no doubt as to its intent and meaning, and not being bound by a settled and fixed judicial interpretation of the word "until," I find that a forfeiture had occurred, and mining claim L.8200 was open for staking after midnight of the 30th day of June, 1921.

The extension granted was in the nature of an indulgence within the jurisdiction of the Mining Commissioner to grant, and not a statutory allowance, and should not in this respect be liberally construed.

It is not a case for costs.

The appeal of W. H. Smith should be allowed, his application should be recorded, and the recording of mining claim L.9250 staked by H. Racicot on behalf of D. A. McPherson should be cancelled.

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The appeal from the decision of the Mining Commissioner was by D. A. McPherson.

November 22. The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., MIDDLETON, J., and FERGUSON, J.A.

S. H. Bradford, K.C., for the appellant, argued that the word "until" in the order of the Mining Commissioner included the 1st July in the time allowed for the performance of the deficiency of the work: *Dakins v. Wagner* (1835), 3 Dowl. 535; *Isaacs v. Royal Insurance Co.* (1870), L.R. 5 Ex. 296; *Bellhouse v. Mellor*, 4 H. & N. 116; Halsbury's Laws of England, vol. 27, p. 446, para. 881. Therefore Smith's staking was premature, and McPherson's was entitled to priority.

H. R. Frost, for W. H. Smith, the respondent, contended that under the proper interpretation of the word "until" the time for performing the work expired at midnight on the 30th June, and so Smith's staking was entitled to priority: *Rogers v. Davis* (1845), 8 Ir. L.R. 399; Bouvier's Law Dictionary, tit. "Until."

Bradford, in reply.

December 30. MACLAREN, J.A. (after briefly stating the facts):—The sole question argued before us was, whether the time for the performance of the deficiency of the said work expired at the close of the 30th June or whether it included the 1st day of July.

Smith asserted that his discovery and staking at 12.01 a.m. on the 1st July was good, while McPherson maintained that Hargreaves' time did not expire until the close of the 1st July, and that his discovery and staking by H. Racicot at 12.01 a.m. on the 2nd July gave him priority.

The Mining Recorder rejected the claim of Smith as being premature, and accepted and recorded the claim of McPherson. Smith appealed to the Mining Commissioner, who held that the time fixed by the order of the 7th February expired on the 30th June, and that Smith was entitled to priority and to have his discovery and staking accepted and recorded.

The appeal was argued before us wholly upon the meaning and effect of the concluding paragraph of the order of the 7th July above quoted and especially of the word "until."

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I am of opinion that the words are not to be construed in any unusual or technical sense, but in the same manner as if a debtor had approached his creditor or one who had power to grant him an extension, and the time for payment had been "extended until the 1st day of July next." I have no doubt that the vast majority of people would interpret it as was done by the Mining Recorder and include the 1st July. As the Commissioner was conferring a favour upon the applicant, even if there was any ambiguity in the language, it would not be presumed that what he was giving with one hand he would take away with the other.

If, on the other hand, we should endeavour to ascertain how the words have been construed by the highest legal authorities, I am of opinion that we should arrive at the same conclusion. The leading modern case, in which the older cases are reviewed by Kelly, C.B., is *Isaacs v. Royal Insurance Co.*, L.R. 5 Ex. 296, where property was insured for six months from the 14th February to the 14th August, and was destroyed by fire on the 14th August. Among other cases cited by the Chief Baron was *Ackland v. Lutley* (1839), 9 A. & E. 879, where a lease was granted for 21 years from the 25th March in a particular year. It was held to last until the end of the 25th March of the last year of the lease. In *Bellhouse v. Mellor*, 4 H. & N. 116, where an order of protection was granted to a bankrupt until the 29th July, it was held that the whole of the 29th July was included.

In *Webb v. Fairmaner* (1838), 3 M. & W. 473, where goods were to be paid for "in two months," it was held that the last day was included. These and other authorities, said the Chief Baron (L.R. 5 Ex. at p. 300), "illustrate the principle that, in general, the day on which the engagement is entered into is excluded and the last day of the term is included." Barons Martin and Cleasby concurred.

In Halsbury's Laws of England, vol. 27, p. 446, para. 881, in discussing the question, it is said that "regard must be had to the context and to the purposes for which the computation has to be made." The writer concludes the paragraph by stating that, "as a general rule, however, the effect of defining a period in such a manner is to exclude the first day and to include the last day." In the foot-notes under this paragraph there is a collection of cases to the same effect as those above discussed.

I am of opinion that the Mining Commissioner did not proceed in accordance with the provisions of sec. 139 (2) of the

Mining Act in giving his reasons for his judgment or decision in this matter.

What effect, if any, should be given to the statement by the Commissioner as to his intention?

It is trite law that a judgment of the Court must not be allowed to have an effect never contemplated because of an error on the part of ministerial officers in drawing up the formal decree. This, however, has no application to the present case.

Here an application was made to the Mining Commissioner to relieve from default. He might grant any extension of time he saw fit; he said he extended the time until the 1st July. The order as issued undoubtedly embodies his expressed intention. He now says that what he thought the words used meant was that the time should expire on the 30th June midnight, and on this it is suggested that the order should be amended or should be treated as stating something other than it does. Had the actual judgment read "until 12 p.m. on the 30th June," and had the formal order read "until the 1st July," a case would have been made for the amendment of the order—but the order here follows the judgment.

It is a rule as applicable to the construction of an order of this kind as to the construction of a contract that language used must be construed according to its ordinary meaning and not in some unnatural and esoteric sense.

A judgment once issued cannot be changed if in accordance with the actual decree: *Port Elgin Public School Board v. Eby* (1895), 17 P.R. 58.

It must not be forgotten that this is not simply a matter between the original discoverer and the Crown, but a case in which strangers to the original application are called upon to act on the recorded order and are justified in acting upon it according to its very letter, and what is sought is to deprive one who interpreted it correctly of rights which he acquired, by reason of something of which he had no knowledge, the intention of the Commissioner to use words in a peculiar and unnatural sense. See *Ainsworth v. Wilding*, [1896] 1 Ch. 673.

In my opinion, the judgment of the Commissioner should be reversed, and that of the Recorder restored.

MAGEE, J.A., and MIDDLETON, J., agreed with MACLAREN, J.A.

FERGUSON, J.A. (after stating the facts):—The appeal was argued on the assumption that the effect of the order of the 7th February was to revest in Hargreaves, as of the date of

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the order, all the rights he, under sec. 68 of the Act, formerly had in mining claim L.8200, just as if the forfeiture provided for by sec. 84 of the Act had not occurred, and that therefore the result of the appeal turned on the meaning of the word "until." Though, for reasons which I shall state later, I am of opinion that the claim could not revest in Hargreaves unless and until he did his work, I shall express my opinion of the word "until" as used in the order of the 7th February.

After reading a great many cases in which the meaning of the word "until" is considered and discussed, I think the result of the authorities is accurately stated in 39 Cyc. 841, as follows:—

"*Until.*" A restrictive word; a word of limitation; construed in contracts and like documents as exclusive of the date mentioned, unless it was the manifest intent of the parties to include it. But this construction is not of universal application, and the effect to be given to this word must depend upon the intention of the parties using it, as manifested by the context and considered with reference to the subject to which it relates."

On the foregoing statement of the law, the 1st July would, I think, be excluded from the time allowed Hargreaves to complete his work, unless the context, considered in reference to the subject-matter and the surrounding circumstances, shews that the parties using the word intended to include the 1st July. I find nothing in the context, Act, or surrounding circumstances which would lead me to think that the Commissioner, in making the order, intended to include the 1st July, and he himself says he did not.

If an order or judgment as issued does not express the intention of the Judge who made the order or delivered the judgment, or is ambiguous, it may be changed to express clearly the real intention of the Judge. See *Lawrie v. Lees* (1881), 7 App. Cas. 19, 34; *Ainsworth v. Wilding*, [1896] 1 Ch. 673, 677.

These authorities establish that this power is inherent in the Court pronouncing the order, and does not depend on any rule or statute; and, in view of this inherent power, and the provisions of secs. 139 and 140 of the Mining Act of Ontario, R.S.O. 1914, ch. 32, which give the Commissioner power to act on his own knowledge, I see no reason for rejecting or refusing to act on the statement of the Commissioner as to what he intended in making the order.

I am also of opinion that, if the order of the 7th February be read so as to give Hargreaves all the 1st July to do his work,

yet that the claim L.8200 was not vested in Hargreaves between the 7th February and the 2nd July. Under the provisions of sec. 84, it was a forfeited claim and open for staking.

Section 84 reads in part:—

“(1) Except as provided by section 85, all the interest of the holder of a mining claim before the patent thereof has issued shall, without any declaration, entry or act on the part of the Crown or by any officer, cease, and the claim shall forthwith be open for prospecting and staking out. . . .

“(c) If the prescribed work is not duly performed.”

The only powers the Commissioner had in reference to such claim are defined by sec. 85, which (as enacted by (1918) 8 Geo. V. ch. 9, sec. 7) reads:—

“(1) Where forfeiture or loss of rights has occurred under section 84, the Commissioner within three months after default may, upon such terms as he may deem just, make an order relieving the person in default from such forfeiture or loss of rights, and upon compliance with the terms, if any, so imposed the interest or rights forfeited or lost shall revert in the person so relieved”

Under that section, the Mining Commissioner could relieve with or without terms. If he relieved without terms with the intention that the balance of the work should be done, there is no provision in the Act for a further forfeiture. If he relieved on terms, then the claim did not revert until the terms were performed, and I think the order of the 7th February must be read as relieving on terms, and that consequently Hargreaves' rights to the claim were not reverted unless and until he did the work, and the evidence is that he did not do the work, and these two strangers came in and staked. No doubt, both of them were under the impression that neither could stake until the time had elapsed for Hargreaves doing his work, but I think the Act means that either could have staked at any time up to the work being done, taking a chance as to the purpose of the staking failing in case Hargreaves did his work, or the alternative of acquiring the claim in case Hargreaves did not do his work.

Under these circumstances, Smith staked first, and I think his staking should be allowed and recorded. I would dismiss the appeal.

HODGINS, J.A.:—I agree in the judgment of my brother Mac-laren, which I have had the advantage of seeing, and only desire to add a word as to my brother Ferguson's view that the

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claim was not vested in Hargreaves between the 7th February and the 2nd July, and that the claim was not to be revested until the work was completed.

As I read the Mining Act, under sec. 68 the recording of a mining claim gives the person so recording the status of a licensee of the Crown with the right to proceed to obtain a certificate of record and a patent from the Crown.

Under sec. 85, when, by reason of the work prescribed in the statute not having been duly performed, a loss of these rights has occurred, the Mining Commissioner may, within three months after default, make an order relieving the person in default from such loss of rights. In so doing he may impose such terms as he may deem just, and, if he does so, the interest lost shall revest in the person relieved upon compliance with those terms.

I think these two sections indicate that the Commissioner may, if he chooses, put the holder of a mining claim back into the position given him by sec. 68, conditionally on performing certain acts such as obtaining a special renewal license, or filing a proper report; and, if he does so, the revesting is postponed till the act required is accomplished. But the Commissioner may, as I read the Act, make such order without conditions, and that appears to be the effect of the order now in question, because the doing of the work is not made a condition precedent to the revesting, but the Commissioner reinstated the claim and then extended the time for the work until the 1st July, 1921.

The power of the Commissioner to extend the time for the performance of the work was not questioned, and I do not think it can be, in view of the wide jurisdiction given to him under the Mining Act and its various amendments, including 11 Geo. V. ch. 16, assented to on the 3rd May, 1921.

Having made the order, as I think, unconditionally, revesting the property in the applicant, the Mining Commissioner went on, in that order, to say as follows:—

“And I further order that the time for the performance of the deficiency of work upon the said claim L.8200 be extended until the 1st day of July next.”

Upon the expiration of that time, the provisions of sec. 84, subsec. (c), would operate, and the interest revested by the Commissioner would, on default being made in the performance of the work within the time limited, cease and determine.

Appeal allowed (FERGUSON, J.A., dissenting).

[APPELLATE DIVISION.]

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Highway—Toll Roads—Expropriation by County Corporation—Toll Roads Act, R.S.O. 1914, ch. 210, secs. 75, 76—Compensation—Arbitration and Award—Method of Estimating Compensation—Test of Value—Material in Place as Foundation for Construction of New Roadways—Evidence—"Special Adaptability"—Appeal from Award.

A county corporation took the requisite proceedings for expropriating the "toll roads" (as defined in the Toll Roads Act, R.S.O. 1914, ch. 210, sec. 75) of four different toll road companies. In the case of each company there was the arbitration provided for by sec. 76 of the Act to fix "the price or compensation to be paid for the road;" and in each case the arbitrators made an award. The county corporation appealed from the awards:—

Held, that, while the value to the owner, and not the value to the taker, was the basis upon which compensation should be awarded, and while the roads had become a burden instead of a benefit to their owners, the companies were entitled to be paid for the physical assets they possessed—road material in place, bridges, culverts, ditches, and parts of roads owned in fee; and the amounts awarded were not excessive.

Judgment of ROSE, J., dismissing appeals from the awards, affirmed (MEREDITH, C.J.C.P., dissenting).

Per MIDDLETON, J.:—Work had been done upon the ground and material had been placed which would be of advantage to the purchaser; and the purchaser should pay as much at least as it would cost him to do the work and supply the material.

Per MEREDITH, C.J.C.P.:—The roads were as going concerns or in the market worth nothing to their owners immediately before the county corporation took them, and it might reasonably be said that the owners were not entitled to compensation; but the county corporation were willing to pay the actual amounts saved to them in getting the old roads, instead of constructing new ones elsewhere, and the awards should be reduced to such sums.

Per ROSE, J.:—Discussion as to "special adaptability" and reference to *In re Gough and Aspatia etc. Water Board*, [1904] 1 K.B. 417, and *Sidney v. North Eastern Railway Co.*, [1914] 3 K.B. 629.

APPEALS by the Municipal Corporation of the County of Carleton from four awards of arbitrators upon arbitrations held, pursuant to sec. 76 of the Toll Roads Act, R.S.O. 1914, ch. 210, to fix the "price or compensation" to be paid by the appellants upon the expropriation of the toll roads (as defined in sec. 75 of the Act) owned by four different toll road companies, viz., the Ottawa and Gloucester Road Company, the Nepean and North Gower Consolidated Road Company, the Bytown and Nepean Road Company, and the Ottawa Montreal and Russell Consolidated Road Company. There were four separate arbitrations, the three arbitrators being the same in each case.

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February 7, 8, 9, and 10. The appeals were heard by ROSE, J., in the Weekly Court, Toronto.

J. E. Caldwell and *T. J. Agar*, for the appellants.

George F. Henderson, K.C., for the Ottawa and Gloucester Road Company.

Wentworth Greene, for the Nepean and North Gower Consolidated Road Company and the Bytown and Nepean Road Company.

Ainslie W. Greene, for the Ottawa Montreal and Russell Consolidated Road Company.

June 10. ROSE, J.:—The County of Carleton took the requisite proceedings for expropriating the “toll roads” (as defined in the Toll Roads Act, R.S.O. 1914, ch. 210, sec. 75) of four different toll road companies. In each case there was the arbitration provided for by sec. 76 of the Act to fix “the price or compensation to be paid for the road.” The arbitrators, in each case, were Mr. F. H. Chrysler, K.C., appointed by the county, the late Mr. R. G. Code, K.C., appointed by the company, and Mr. J. A. Ritchie, chosen by the other two as third arbitrator. In the case of the Ottawa and Gloucester Road Company, and in one other case, the award was made by Mr. Ritchie and Mr. Chrysler, Mr. Code refusing to join. In the other two cases the arbitrators were unanimous. In each case the county corporation moves against the award. I deal first with the case of the Ottawa and Gloucester Road Company, because it was argued first, and what I have to say that is common to all four cases will be said in this judgment, and not repeated.

Besides making their award in each of the cases respectively, the arbitrators handed out a memorandum intituled in the matter of the four arbitrations, in which they all joined. This, while it is endorsed “Reasons,” does not set forth the calculations by which the various amounts awarded were arrived at; indeed, it is, in effect, little more than a description of the evidence adduced and of the contentions made by the county on the one side and by the road companies on the other. It ends, however, with the statement that all the considerations set forth were present to the minds of the arbitrators, who “endeavoured to give due effect to all of these matters in making their award;” and counsel for the appellants, linking together that statement and a statement made earlier in the memorandum, to the effect that the statutory definition of “road” (in sec.

75 of the Act) "is now wide enough to include some value for the toll road itself, as well as for the franchise of the company," argue that it appears from the memorandum that the arbitrators, losing sight of the fact that the physical assets which were being taken away from the companies were property which (except some toll houses and other things of small value), whether in the hands of the companies or of any purchaser from them, was subject to great restrictions as to the use to which it could be put, had attached separate values to the physical assets and to the "franchises" of the companies and had added these values together, instead of considering the assets (including the fixed and movable property and the franchises) as a whole and arriving at the value of that whole to the companies. It seems to me that this argument can be supported only by a very strained and unnatural reading of the memorandum; and that when the memorandum is read along with the reporter's notes of the discussions that took place during the course of the proceedings it is quite impossible to attribute to the arbitrators any such error as is suggested.

The increasing use of motor vehicles has made the upkeep of macadam roads a very expensive matter, and latterly the companies have not been making profits; and counsel for the county suggest that, having regard to the statutory obligation of a road company to keep its road in repair, the roads had become a source of expense rather than of profit—a liability rather than an asset. They do not, however, contend that the argument based upon this suggestion should be pressed to what seems to be its logical conclusion—they do not say that the companies should be awarded nothing or merely nominal sums—but they do say that the only fair way of getting at the compensation is to capitalise the average annual profits of the companies, over the whole period of their existence. It is fairly obvious from the figures that the arbitrators did not proceed by capitalising profits—whether that method was suggested to them or only to me upon the argument of the motions, I do not know—but it does not follow, unless that method is the only method permissible in such a case, that the arbitrators have adopted a wrong method or that they have adopted the plan which counsel say the memorandum of their reasons shews that they did adopt.

That the plan of capitalising earnings is the proper plan, or a permissible plan, in certain cases, appears from the recent judgment of the Appellate Division in *Re Cobourg and Graf-ton Road Co.* (1921), 50 O.L.R. 125, 64 D.L.R. 241; but neith-

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er in that case nor elsewhere, so far as I am aware, has it been laid down that it is a plan which must be followed in all cases. The companies in the cases in hand were able to adduce evidence which made it practicable to resort to quite another method of computation, a method which is much more likely, as it appears to me, to result, in a case in which it is available, in the ascertainment of the real value of that which is being expropriated; and in none of the cases does it appear that the arbitrators awarded a larger sum than the evidence justifies, if that method of computing the compensation is followed.

Roads ought, of course, to be built with reference to the kind of traffic which will pass over them, and if that traffic includes heavy motor traffic they will have to have a kind of surface which they would not need if they were to be used solely by horse-drawn vehicles; and the more extensive the motor traffic the more expensive will be the foundation and the surface required. The motor traffic has so increased on all the roads in question in these proceedings that, whoever owns them, they will have to be turned into roads having a surface of concrete or asphalt or some other material specially adapted to withstand the wear and tear caused by this kind of traffic. In view of that fact, the companies adduced the evidence of competent and apparently careful engineers, as to the value of the present road-beds to any one who is about to construct, on the sites of the present roads, roads which will be suitable for the traffic in question. These witnesses assigned to the present structures a value, as material in place for road purposes, exceeding the sums which the arbitrators have awarded. It was strenuously argued that to give effect to this evidence would be to substitute for the value to the owner (which was, of course, what the arbitrators had to ascertain) the value to the taker (which the cases say is not the criterion). It appears to me, however, that this argument is not well-founded. In each case it was in evidence that the county was not the only possible purchaser: there are other public bodies which might have taken over the roads, if the county had not done so; and to any one of those bodies, and to the companies themselves, if the companies had decided to construct roads of the type which the traffic now requires, the value would have been exactly the same—the value of material in place, very suitable as a foundation for any road which it is decided to build. To say that the companies are entitled to be paid the value of that material, as material in place, is not to say that the existence of the county's scheme of freeing the roads from tolls and making

them suitable for modern traffic is to be taken as adding to the value of the companies' property: the value exists whether the county's scheme is adopted or not: any one who wants to build roads in the particular locations would be well advised to pay a fair price for this road material. It is not like assigning to the pieces of road, values derived from the fact that they are integral portions of longer roads owned by the county: the values do not depend upon that fact at all, but upon the fact that material has from time to time been put in place and in the course of years has been so consolidated that it now forms, according to the evidence, a foundation for a modern road better than any that could now be laid for the price which the engineers say the companies ought to have. It follows that to take this evidence into consideration is not to do anything which in *Sidney v. North Eastern Railway Co.*, [1914] 3 K.B. 629, the Court said ought not to be done. It is more like applying the rule of *In re Gough and Aspatria etc. Water Board*, [1904] 1 K.B. 417.

But it is said that there would never be competition amongst the various public bodies of which another might have taken over any of these roads if the county had not done so; in other words, that a toll-free road is a liability to a public body, rather than an asset, and that one public body would not bid against another which shewed a disposition to acquire any given road. And it is argued, therefore, that there is no right to take into account any "special adaptability" of the companies' property for the purposes of the county's scheme. This argument is based largely upon what was said by Rowlatt, J., in the course of his judgment in *Sidney v. North Eastern Railway Co.*, but it does not seem to me that the passages referred to really help the county. Upon the land which was in question in that case there had been constructed, by lessees from the owner, a railway leading to a colliery, and this railway had become part of the line of the North Eastern Railway. The lease had expired, and the North Eastern Railway Company was expropriating the land. The question was what it ought to pay. The Court held that regard was to be had to the special adaptability of the land for railway purposes, but not to the existence on it of an integral part of the North Eastern Company's railway, or to the fact of such railway's forming part of the main line: see the judgment of Avory, J., at p. 635. In explaining this holding, Rowlatt, J., pointed out that special adaptability for the purposes of the particular scheme of the expropriating company may be taken into consideration where it can be said

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that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market, but that where the price is reached at which all competition must fail, any further sum which the promoter can afford to pay must be referable not to the value of the land to the owner or in the market, but to the value of the land to the promoter for the purpose of his particular scheme. He did not say, and I am sure he did not mean, that if it could have been shewn that no railway company would bid against another for a piece of land which that other was attempting to buy in order to fill a gap in its line, evidence as to the value of such piece of land for railway purposes generally would be irrelevant. All the cases shew that such evidence is relevant. What is irrelevant in such a case is evidence as to what the railway company can afford to pay rather than have a gap in its line. And in *In re Gough and Aspatria etc. Water Board* (supra), it is distinctly laid down that it is not necessary, in order that the owner may be entitled to have the special adaptability of his land taken into consideration, to prove that the land could be used for the special purpose by any specified body other than the body which is expropriating it.

I have said that to take the evidence of the engineers into consideration in these cases resembles more nearly the application of the rule of *In re Gough and Aspatria etc. Water Board*, than the doing of anything disapproved of in *Sidney v. North Eastern Railway Co.* In the cases mentioned, the land—in the first case by reason of its location and configuration, and in the second by reason of its location—was specially adapted to a particular purpose, and the Court held that that special adaptability was to be taken into consideration. The same thing may be said about the road-beds which the companies have constructed: they have a special adaptability for use as the foundations of roads of a modern character, and the only distinction between those cases and the ones in hand is—and it seems to be a distinction without a difference—that instead of land in its natural state, as in the *Aspatria* and *North Eastern* cases, the arbitrators have had to deal with a manufactured article—a road-bed.

When a municipality exercises the power conferred upon it by the Toll Roads Act of expropriating those assets of a toll road company which are comprised within the statutory definition of a “road” (R.S.O. 1914, ch. 210, sec. 75), it does not

proceed, as it did before the passing of the Toll Roads Municipal Expropriation Act, 1889, 52 Viet. ch. 28, by purchasing the shares of the company's stock, and, therefore, the sum which it has to pay is not necessarily limited to the value of the company's physical assets as dividend-earning property; but it makes what the Municipal Act calls "due compensation" to the company, and the arbitrators, in fixing that compensation, must ascertain the value of what is expropriated, and allow the highest value which the thing expropriated has, for the best use to which it can be put. In these cases the property expropriated included the material which, from time to time during a period of nearly 70 years, had been placed in position by the companies and had become consolidated. It would not have paid the companies to dig up and carry away this material, even if they had been free to do so. The material, however, had a value, as roadways to which additions had to be made in order that they should be suitable for the requirements of modern traffic. The evidence was that the additions could be made for a certain price, and that when they were made there would be in place modern roads having as their foundations something as good as, or better than, newly built foundations costing certain specified sums. These ready-made foundations, therefore,—whether they were called roads to which additions had to be made, or, as I have been calling them, road-material in place and available for use in the construction of new roads—had a value equal to the sums which it would have cost to lay new foundations. That value may be attributed to the "special adaptability" of the property for use for road purposes; and the cases cited shew that the value attributable to that special adaptability is to be taken into consideration in assessing the compensation to be paid to the companies. It seems to me, however, that there is really no need to talk about "special adaptability," or to consider the cases in which it is discussed. These things are roads, and when a certain amount of money is expended upon them they will be perfectly good modern roads: why does it require the consideration of any cases to shew that their value to any one who wants a road is the value of modern roads, less what it will cost to put them in first-class modern condition? The result is the same whichever form of expression is used, but there seems to me to be a certain danger of making a very simple proposition seem abstruse by stating it in the language which has been used in the discussion of complex cases.

If my way of looking at the question is the correct one, it

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is immaterial to consider whether the companies had been making, or had a fair chance of making, profits out of the use of their roads. The evidence as to this will, however, be referred to in the consideration of the individual cases. Each case differs somewhat from the others in this particular, and there is no object in discussing the question at large.

The Ottawa and Gloucester Road Company, with whose case I am now dealing, owned two pieces of road. The materials in place on these two pieces were valued by the engineers called by the company at \$42,136.72 and \$16,006.70, respectively, in all \$58,143.42, the valuation being based upon the kind of calculation that has been described. The company also had certain toll houses and some land; but these were not taken into account.

There was evidence that as roads are improved the motor traffic over them increases; and it was suggested by the witnesses that if these roads had not been expropriated the company might have been well advised to put them in good condition at its own expense, in the expectation that the increased traffic would bring in a revenue large enough to put the company's undertaking upon a paying basis, which it has not been for some years; but no one was prepared to say that the roads could be operated at a profit, unless the Legislature could be induced to authorise the collection of tolls at a higher rate than that now in force; and no one seemed to have any very good reason for saying that, in spite of the modern desire to get rid of toll roads, the Legislature would be very likely to increase the rate. A remark made by Mr. Ritchie in another of the cases (the *Bytown and Nepean Company's* case, at p. 244), indicates that he did not attach much importance to indefinite evidence of this sort; and I imagine that it is safe to assume that it was left out of consideration in this (the *Ottawa and Gloucester Company's*) case, as I think it ought to have been. Certainly, the amount of the award, \$42,500, made by Mr. Ritchie and Mr. Chrysler, is not so large as to indicate that anything was taken into account which the company was not entitled to have considered; indeed, the inference is rather that very considerable effect was given to the criticism by Mr. Hogarth, C.E., of the figures submitted by the engineers called by the company.

The appeal will be dismissed with costs.

The learned Judge also dismissed the appeals from the awards in the cases of the other three companies.

The county corporation appealed from the orders of ROSE, J.

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December 12 and 13. The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

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The argument was by the counsel who appeared before ROSE, J., and is sufficiently stated in the judgments.

December 30. LATCHFORD, J.:—It is, I think, to be regretted that after summarising the evidence and arguments submitted to them the arbitrators should have given no reasons for the conclusions arrived at. They only say that, having such considerations in mind, they endeavoured to give effect to all of them in making their award.

That nothing was allowed for franchises is evident. No claim was made for franchises before the arbitrators or asserted on this appeal.

The companies claimed that they were entitled to be paid for the physical assets they possessed which were taken over by the County of Carleton—road materials in place, bridges, culverts, ditches, and in two cases parts of a road owned in fee.

The contention of the appellants has been and is that these assets are of no value to the owners. During recent years, especially, the revenues have been less than the expenditures for repairs, and no dividends have been available for distribution. The roads have become a burden instead of a benefit to their owners.

In the past it was considered that those immediately benefited by a publicly available utility, such as a macadamised road, should pay for the advantage when and as often as they used it. The modern tendency, however, fostered by such legislation as that under which the appellants have acted, is to impose on the public the cost of constructing and maintaining what only particular persons use. Thus it happens that many taking no part in the dance are compelled to pay the piper. The opinions now held so generally are not likely to change. Unless they do, it is in the highest degree improbable that any one of the toll roads concerned in this appeal will produce a return to its shareholders. Hence the contention that the roads are worth nothing to their owners. This, pushed to its logical conclusion, means, as pointed out by Mr. Justice Rose, that nothing whatever should be paid for the properties expropriated. I am glad that no such view was taken in the award or in the judgment in appeal. I have had the advantage of know-

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ing the three arbitrators intimately throughout a period of 30 years. One of them, who was an honour to his profession and to Canadian manhood, recently passed from this life. All three have been widely recognised in this Province as men of great business capacity, sound judgment, and absolute honesty. They unanimously rejected as untenable the contention of the appellants, although they did not in all the cases agree as to the amount payable. They did not in any case allow as much as evidence shewed to be the value to the county of the property expropriated, though doubtless they did not wholly disregard that consideration. It was open to them to decline to accept as to any particular road the estimate of value fixed by the appellants' engineers or by the engineers of the respondents or to arrive as they did in fixing due compensation at values greater than one or less than the other estimate.

I have no reason for supposing that the several amounts awarded are in any way excessive, and would therefore dismiss the appeals.

MIDDLETON, J.:—I have come to the conclusion that the appeals should be dismissed. The value to the owner, and not the value to the taker, is said to be the test of the amount to be paid, but this does not mean what is here contended by counsel for the county. To the county a road which is an essential link in a system may have such value that, if no right of expropriation exists, almost any price might be extorted, and it is this kind of thing the rule is aimed at. For similar reasons, property which has some special suitability for the scheme of the taker may have great value to him, but this is not the index of the price to be paid to the owner in whose hands it has no such special utility.

I should rather apply some such test as this: Assume no right to expropriate, but a willing vendor and a willing purchaser, honestly endeavouring to adjust a fair price. Work has been done upon the ground and material has been placed which will be of advantage to the purchaser. He should pay as much at least as it would cost him to do this work and supply the material. Work done which is useless, and material which is valueless to the purchaser, should be disregarded.

Applying this test, the engineers for the company proved figures exceeding the award.

Counsel for the appellants admitted that any expropriation which took the property without such compensation would be confiscation, but would not admit liability for any amount be-

yond what the engineers appointed by the county admit.

Once it is shewn or admitted that such allowance should be made, the amount must be determined on the whole evidence and not by the admissions of the witnesses of the one party. The amount awarded is more than the county engineer admits, but less than the opposing engineers prove. The evidence amply justifies the awards.

The appeals should be dismissed with costs.

RIDDELL, J., agreed with MIDDLETON, J.

LENNOX, J., agreed in the result.

MEREDITH, C.J.C.P. (dissenting) :—The facts upon which the rights of the parties to these four appeals depend are few, simple, and plain.

The respondents are toll road companies, and the appellants are a municipal corporation taking over the toll roads of such companies in the interests of the public and at public expense.

Toll roads, such as those in question, have long since had their day; and are now commonly said to be “relics of barbarism” which should long since have passed away.

In earlier days there was need for them, and many of them made some profit, though never much.

And, as to these very roads, it had come to pass that for many years—some one said 17 years—they had been altogether profitless, and should long ago have become public ways but for the forlorn hope of the companies that some day such a thing as that which has happened might happen—they might be taken by the local municipality, the county municipality, or the Province, and that such taking might bring some money into the pockets of the shareholders of the companies for a thing that was worthless, if not worse than that—an annual loss—to them.

The road companies’ rights and duties were those prescribed in the Toll Roads Act, under which they were incorporated: and it is said to be under the provisions of that Act that they are taken over by the appellants: and that that which the companies are entitled to from the county is due compensation for the roads taken: and the question is: what is the proper amount of such compensation, if any, for each of the roads in question?

The roads being, and having been for many years, profitless, and with no future as roads owned by the road companies, except of more and more unprofitableness as the free roads con-

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tinue to be made better and better, it may very reasonably be said that they are not entitled to compensation: that they are in a money sense the better off the sooner the roads are abandoned or taken over.

The answer to that is: but they are of much value to the respondents: getting them—even in the worthless, for the respondents' purposes, condition in which they are as roads—must save the respondents much money that must have been spent in buying land and making a new road, or in making the road if they adopted another existing one which is a free highway.

The obvious reply is: it is not the value to the appellants, but it is the value of the road to the companies, that is the measure of compensation to be paid by the appellants.

But the logic of these contentions does not cover the whole subject of compensation, for in some instances the value to the taker may be the real value to the loser. If the case were one of an ordinary mercantile transaction, the value to a purchaser might well be the general value of the article; that which purchasers are willing to give is very good evidence of actual value; it is either really the market price or something very like it.

This, however, is not a case of that kind: the road companies' rights are not the ordinary common law rights of the owner: they are only such as toll roads legislation has conferred, and they are subject to the onerous obligations imposed by that legislation, as well as to the forfeitures, etc., provided for in it.

So, too, it must be borne in mind that the main purpose of the enactments was not the enrichment or benefit of the company or its shareholders. It was to aid the public of the neighbourhood, particularly, and His Majesty's liege subjects generally, in affording them some better roads in the days when that could not be as well done out of the taxes available for that purpose.

The shareholders of the companies knew that when, out of taxation, free roads were improved, the traffic should depart from them, and that all toll roads must in time be abandoned. That was inevitable and always obvious.

So that it is not surprising that when, after that time had come and yet the toll road companies clung to their roads for the sole purpose of compelling the public to take the roads from them and pay large sums of money for that which was worthless to the companies, resentment of the travelling public went farther than the use of harsh words; that efforts were

concentrated on improving another road so as to draw off the traffic from the toll road; the toll road was avoided, payment of tolls evaded, and sometimes malicious injury done to toll gates and gate houses, making the lot of the toll road companies, hard and profitless enough at best, a still harder one.

During the past quarter of a century or so, the natural life of most of the toll roads came to an end: free highways had been so improved that traffic could be mainly carried on upon them: the time came in which it was unprofitable to maintain the tolls at the cost of the obligations of the toll road companies. Most of the companies came to their inevitable, and from the first obvious, end, without litigation, though all made efforts in different ways to obtain money from the public, through the municipalities or the Province, before making the abandonment of these roads provided for in the legislation to which they owed their existence, and by which they were bound.

All the companies which litigated their rights had, as the respondents here had, for many years before, that litigation in view, and had adopted all the means possible to fortify their position and increase any award of compensation that might be made in their favour: whilst, on the other hand, no steps of an opposite character were taken in the public interests: the municipalities and the Province seeming to rest in the mistaken belief that there was no need for forethought and forearming, that, no matter what might be done, the result should be the same, that the law had fixed some invariable and true measure of compensation that must in the end prevail.

The companies' position, in thus holding on year after year, unable to improve the roads, unable to extract any profit from them, yet refusing to abandon them as provided for in the legislation under which alone they could exist, has been called a "dog in the manger" policy; but that is hardly fair to the fabled dog; he was not anxiously waiting only to be enticed out with a golden bone, whilst the public had in the hands of the municipalities and of the Province a whip which might have been employed quite as effectually.

The municipalities, or others in the same interests, might have purchased a controlling number, or all, of the shares of these companies, which shares had come to be really worth nothing, and having them could have abandoned the road or have sold out for such consideration as they deemed right. The municipalities or the Province could have chosen an adjacent public way and have constructed their "state highway" upon it, and have driven the toll road companies to abandonment:

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or they could have made their highway alongside of the toll road, with the advantages of a wholly modernly constructed and placed road, and so also should have done that which commonly is described as throwing the toll road into the scrap-heap, and so compelling abandonment which would enable the municipalities to give the land-owners upon whose land the new road was built, the old road in lieu of it.

These things are not mere "moral" consideration: they are decisive of the companies' claims for compensation; for, if they had the whip hand and could exact their own price, their road might be worth that much to them: whilst, if the municipalities or the Province held the whip, and could compel abandonment, there can be no compensation for a thing which in itself was worthless to the companies.

The municipalities and the Province having plainly had the whip hand, the companies could get from them only that which they in the public interests deemed it fair to pay, and that was very fairly put by them, in these cases, at the actual saving to them in getting the old road—instead of constructing a new one elsewhere—as measured and ascertained by the competent public officers and men employed in the actual work of constructing the new highway in the place where the old one was. The appellants having been, and being as I understood Mr. Caldwell, willing to pay these sums, instead of applying the thumb-screws which I have mentioned, and paying nothing, I am in favour of allowing these appeals and reducing the awards to such sums. The appellants are entitled to their costs of these appeals.

To prevent any notion that any contention in the companies' favour has been overlooked, it may be well to add some words in regard to the suggestion that the companies might have made cement or asphalt roads, as well as the county or the Province: it should hardly be needful to say that the companies were penniless, without power to acquire new stock, and subject to a limitation of tolls which made it impossible to keep up even a gravel road: and that these new toll roads could have been, equally with the old ones and by like method, driven to the scrap-heap. Toll roads cannot pay, toll roads cannot live to-day, here.

Then it was said that one of the roads and some additions to others were not highways originally, but that the land for them had to be bought by the companies in order to make these roads. But how can that affect the question here involved? It is the roads which are being taken, the roads as

they are, and the question is not how much did the companies pay for them, but is: what were they worth to the companies before the appellants appropriated them? Not what were they worth after the appellants' purposes respecting them became known and had been carried into effect: see *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, 16 D.L.R. 168. When the land was purchased and made part of the road, the company had no more power over it than if the land or right of way had cost nothing: the road was altogether subject to the provisions of the Act and could be dealt with only as permitted by the Act; if abandoned, it must be altogether abandoned.

But the sole question here is, what were the roads, as they were, worth to the companies immediately before the appellants appropriated them? The answer is, unquestionably: nothing as going concerns, worse than worthless in that respect, and nothing in the market; there are no purchasers for such profitless things: and nothing in holding the manger, against the public, because the municipalities and the Province held the whip by which they might without cost lawfully be driven out.

To make the public pay for physical assets, that were of no value to the road companies, because they were or might be of some value to the public, is to disregard the plain provision of the law.

Appeals dismissed (MEREDITH, C.J.C.P., *dissenting*).

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[IN CHAMBERS.]

Dec. 31.

LEADERS CLOAK CO. V. RINDER.

Judgment—Motion for Summary Judgment under Rule 62—Jurisdiction of Master in Chambers—Scope and Operation of Rule—"Urgency"—Conduct of Defendant—Practice—Bankruptcy Act.

The Master in Chambers has jurisdiction to entertain a motion for summary judgment under Rule 62.

Scope of Rule 62 considered.

It is not now confined to equitable causes.

The "special reason for urgency" which the Rule requires must arise from some conduct of the defendant.

Oliver v. Frankford Canning Co. and Presque' Isle Canning Co. (1920), 47 O.L.R. 43, explained and followed.

Where the reason alleged for urgency in obtaining judgment in an action for a money demand was that the defendants' goods were damaged by fire and that they were holding a fire sale, and no disposition of assets so as to defraud creditors was alleged, the plaintiffs' motion for judgment was dismissed.

Leslie v. Poulton (1893), 15 P.R. 332, and *Molsons Bank v. Cooper* (1894), 16 P.R. 195, followed.

Creditors now have the Bankruptcy Act to aid in dealing with insolvent debtors.

AN appeal by the plaintiffs from an order of the Master in Chambers dismissing a motion for summary judgment under Rule 62*, in an action for a money demand.

December 29. The appeal was heard by MIDDLETON, J., in Chambers.

N. Phillips, for the plaintiffs.

D. W. Markham, for the defendants.

December 31. MIDDLETON, J.:—The Master in Chambers gave no reasons for judgment, but, I am told, held that the motion was not properly made before him, that it should have been made in Court; and, secondly, that the case had not been brought within Rule 62.

With reference to the first point, I am told that the Master preferred the annotation to this Rule in Holmsted's Judicature Act, p. 411, and the views expressed in an anonymous ar-

*62. Where a writ is specially endorsed and some special reason for urgency is shewn the plaintiff may, at any time, by leave, serve notice of motion for judgment. Such leave may be given *ex parte* and subject to such directions, as to the service of the notice of motion and filing and service of the affidavits and otherwise, as may seem just.

ticle in the Canada Law Journal, vol. 56, p. 101, to my judgment in *Oliver v. Frankford Canning Co. and Presqu'Isle Canning Co.* (1920), 47 O.L.R. 43. Middleton, J.
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It may be that what was there said was dictum only. I thought it was more—but, without repeating, I now adopt it and determine that the Master was in this respect wrong and that he had jurisdiction.

The author of the anonymous article adds nothing save to point out that, in his view, when Rule 207 (8) refers to Rules 57-62, the intention is that Rule 62 shall be excluded. This is evidently written in complete ignorance of sec. 28 (m) of the Interpretation Act, which provides that when reference is made to two or more sections of a statute by number both shall be deemed to be included.

On the merits I think the Master reached the proper conclusion.

Under the Rule from which Rule 62 was derived, two decisions of the Court of Appeal determine its scope and operation. I refer to *Leslie v. Poulton* (1893), 15 P.R. 332, and *Molsons Bank v. Cooper* (1894), 16 P.R. 195. Both determine that the plaintiff must shew not only such a case as to entitle him to succeed upon a motion for judgment under the Rule corresponding with Rule 57, but must also shew some special ground calling for the application of the Rule in question. In the earlier case mere anxiety on the part of the plaintiff and fear that delay might jeopardise his recovery was, it was held, not enough, it not being shewn that the defendant was about to make any fraudulent disposition of her property. In the later case the natural desire of the plaintiff to obtain a judgment in time to enable it to rank in a distribution of the debtor's assets under the Creditors' Relief Act was not regarded as sufficient.

In these cases there are expressions going to shew that the Rule had no application to actions between a creditor and his debtor, but was confined to equitable causes, as the Rule had its origin in an old Chancery "General Order." All doubt is now removed, as Rule 62 is expressly made applicable to all cases in which the writ of summons is specially endorsed.

The present Rule contains a provision, not found in the former Rule, that an application under it can only be made when "some special reason for urgency is shewn." I do not read this as an adoption of the interpretation placed upon the old Rule, but rather as an indication that the Rule should be available whenever some special reason for urgency is shewn, the existence and sufficiency of the urgency being a question of fact

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in each case. I adhere to the view taken in the case of *Oliver v. Frankford Canning Co. and Presqu'Isle Canning Co.*, that in general the urgency must arise from some conduct of the defendant. Here all that is shewn is that the defendants' goods were damaged by fire and they are holding a fire-sale. No disposition of assets so as to defraud creditors is alleged, and it must be kept in mind that creditors now have the Bankruptcy Act to aid in dealing with insolvent debtors.

The motion must be dismissed, but the costs here and below may well be to the defendants in the cause. ✕

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[IN CHAMBERS.]

BARRETT V. HARRIS.

Parties—Representation—Rule 75—Unincorporated Association—Action against, to Recover Damages for Tort—Trust-fund.

In an action against three individual defendants, who were the principal officers of an unincorporated association, and a city corporation, to recover damages for a tort, the plaintiff moved for an order, under Rule 75, appointing the three individual defendants to represent the association and authorising them to defend the action for the association:—

Held, that in an action to recover damages for a tort the Rule cannot be invoked unless it is intended to be alleged that the unincorporated body is possessed of a trust-fund, and such circumstances exist as entitle the plaintiff to resort to that fund in satisfaction of his claim: in such case the trustees may be appointed to represent the general membership in defending the fund.

Review of the authorities.

Remarks upon the application of the Rule.

The association having no trust-fund, the motion was dismissed.

MOTION by the plaintiff for an order appointing the three individual defendants to represent the Monarch Park Business Men's Association, and authorising them to defend the action for the association, which was unincorporated. The individual defendants were the president, the secretary, and the treasurer of the association.

November 28. The motion was heard by MIDDLETON, J., in Chambers.

Norman S. Macdonnell, for the plaintiff.

R. H. Greer, K.C., for the individual defendants.

William Johnston, K.C., for the defendant the Municipal Corporation of the City of Toronto.

December 31. MIDDLETON, J.:—Little appears upon the material, but counsel admitted the following facts. The association is a voluntary association to advance the interests of the merchants in a certain locality in the city of Toronto. There is no incorporation and no property save possibly some small sum derived from membership fees. To advance the objects of the association, some demonstrations were held upon the streets, and a rope was stretched across a highway to prevent the crowd from interfering with what was taking place. It is said that this was placed by the leave of some civic official. The plaintiff, in lawful use of the road, was travelling in an automobile, and this rope caught the cap of the radiator of the car and threw it violently in the plaintiff's face, so injuring an eye as to cause blindness.

The action is brought against the three individual defendants and the city corporation, and what is sought is that some right to a remedy against the association may be found by this application, based on Rule 75. This Rule is as follows:—

“Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorised by the Court to defend, on behalf of or for the benefit of all.”

This Rule is based upon an English Rule introduced by the Judicature Act, and is an attempt to graft upon the common law practice a procedure familiar in equity. Where what is sought is a declaration of right or an injunction or other equitable relief, there is not much difficulty in applying the Rule, but where what is sought is the purely common law remedy of the recovery of money in respect of a tort, new difficulties present themselves. The technical aspect of the case soon becomes confused with fundamental questions—e.g., the liability of all the members of an association for the wrongful act of one.

A short review of the decisions is necessary to understand the situation.

In *Temperton v. Russell*, [1893] 1 Q.B. 435, the plaintiff sued members of the committee of a trade union as representing the union, seeking damages for wrongfully procuring persons who had made contracts with him to break them, and for an injunction. A Divisional Court struck out of the writ of summons all words indicating that the defendants were sued as representing their fellow-members, and on appeal to the Court of Appeal this decision was affirmed. Lord Justice Lindley, who delivered the judgment, laid down certain principles which have since been much discussed and have not been accepted in their entirety:—

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First, the Rule requires the persons represented and the defendants to have the same interest in one cause or matter, and this extends only to persons who have or claim some beneficial proprietary right which they are asserting or defending.

Second, the Rule only enables the former equitable jurisdiction to be exercised by all the Divisions of the Court, and so has no application to actions of tort.

Third, an injunction could not even in equity be granted against persons who were not parties to the action.

This case was followed in *Wood v. McCarthy*, [1893] 1 Q.B. 775, by Wills, J., who pointed out that the defendants against their will could be nominated to represent the class.

In *Ellis v. Duke of Bedford*, [1899] 1 Ch. 494, and *Duke of Bedford v. Ellis*, [1901] A.C. 1, the question of the accuracy of those statements was considered. In this case the plaintiffs joined in an action against the Duke of Bedford, the owner of Covent Garden Market, claiming, on behalf of themselves and all others the growers of fruits, flowers, etc., a declaration of certain rights in the market which they claimed to possess under a statute relating to the market. The Court of Appeal held that the plaintiffs had such an interest in common as to enable them to maintain the action. Lindley, M.R., was a member of the Court and agreed; in fact he wrote the leading judgment. There is no suggestion in any of the judgments that *Temperton v. Russell* was not well decided. In the Lords, Lord Macnaghten points out that what was said by Lindley, M.R., was too narrow, and that the Rule applied even where there was no proprietary right, and that plaintiffs might always, in equity, sue where there was "a common interest and a common grievance . . . if the relief sought was in its nature beneficial to all whom the plaintiffs proposed to represent" ([1901] A.C. at p. 8). The learned Lord points out the true ambit of the rule. It is "to apply the practice of the Court of Chancery to all divisions of the High Court" (p. 8). The old practice of Chancery was based upon the principle that the Court required the presence of all parties interested in the matter or suit in order that a final end might be made of the controversy. Where the parties are numerous, you can only "come at justice" with any convenience by the device of a representative suit. *Temperton v. Russell*, apart from the dicta, was well decided, for "the attempt made there to invest the defendants with a representative character was absurd on the face of it" (p. 10).

In the same year, the case of *Taff Vale Railway Co. v. Amal-*

gamated Society of Railway Servants, [1901] A.C. 426, was decided; Lord Macnaghten and Lord Lindley both taking part in the decision. Two questions were determined. A trades union can be sued under its own name by reason of the status given it by legislation, and such a union is liable for damages for injury which it inflicts. There are, however, weighty dicta bearing on the question before me. Lord Macnaghten (p. 439) repudiates an argument put forward by Mr. Haldane, that where a wrong is done by a body of persons acting in concert, too numerous to be made defendants, the person injured would be without remedy, unless he could fasten upon the individuals who with their own hands had done the wrong. The illustration is given of an unregistered trading body operating a factory which fouled a stream, where it was said defendants might be sued in a representative capacity. It is not said whether this would only be so if an injunction was claimed or whether it would equally be the case if the claim was for damages.

Lord Lindley's remarks are particularly important. He points out (pp. 442, 443) that the problem is not new. The common law rules as to parties were too rigid for practical purposes when attempted to be applied to trades unions. The more flexible rules of equity allowing class representation were essential to prevent a failure of justice. He refers to the statement of Sir George Jessel, M.R., in *Commissioners of Sewers v. Gellatly* (1876), 3 Ch. D. 610, 615: "Where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right . . . some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted."

Lord Lindley then adds ([1901] A.C. at p. 443): "The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires." He then refers to the "unfortunate observations" on the rule in *Temperton v. Russell*, "happily corrected" in *Duke of Bedford v. Ellis*, and adds: "I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of the members (its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for dam-

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ages could be obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union."

This being the state of the law, *Metallic Roofing Co. of Canada v. Local Union No. 30* (1905), 9 O.L.R. 171, was determined by the Court of Appeal. The defendant was an unincorporated body and was sued in its name, which was held to be improper, but it was held that an order might properly be made permitting certain named defendants to be sued for the class; although the action was based on tort, the allegations being very similar to those of the plaintiff in *Temperton v. Russell*, an order should be made for representation of the members of the union.

It is pointed out in this case, as well as in the English cases, that "the use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used." The sequel is important. The plaintiff was awarded the costs of appeal, and the problem of realisation had to be faced, and the result is found in *Metallic Roofing Co. of Canada v. Local Union No. 30* (1905), 10 O.L.R. 108, where it was held that the costs awarded against the representative defendants could not be realised by garnishee process attaching money to the credit of the union. The Court refused to consider what would be the situation in the event of a recovery in the action. At the trial there was a recovery, and the Court of Appeal indicated that under this the property of the society could be taken: *Metallic Roofing Co. of Canada v. Jose* (1907), 14 O.L.R. 156; but this was reversed upon another ground by the Privy Council (*Jose v. Metallic Roofing Co. of Canada*, [1908] A.C. 514) and a new trial directed. There was no indication by the Judicial Committee that it thought the action improperly constituted.

Since then, light has been thrown upon the situation by two important cases in England, *Markt & Co. Limited v. Knight Steamship Co. Limited*, [1910] 2 K.B. 1021, and *Walker v. Sur*, [1914] 2 K.B. 930.

In the former case a ship had been sunk at sea. The plaintiffs, who had shipped goods upon her, sued, on behalf of themselves and other owners of cargo, for damages by reason of

breach of contract and duty in the carriage of the cargo. It was held that the plaintiffs and those whom they undertook to represent had not "the same interest in one cause or matter" within the meaning of the Rule. The scope and due application of the Rule are discussed at some length, and an acute difference of opinion upon matters of importance upon this motion was developed.

Vaughan Williams, L.J., points out that in *Duke of Bedford v. Ellis* the essential thing was that all the class had the same rights and all relied upon the same charter, and that according to the old Chancery idea all must in some way be parties to the action. Here the rights of each depended upon his own contract, and each might sue to enforce his rights without making the other a party to the action. The test is not the same as that applicable when considering the right of individuals to join as plaintiffs, when it is enough to find that the rights claimed arose out of the same occurrence, and there is a common question to be tried. (See Rule 66). Fletcher Moulton, L.J., first emphasises this distinction, and applies as the test in the case in hand Lord Macnaghten's paraphrase of the Rule, "Given a common interest and a common grievance, a representative suit is in order if the relief is in its nature beneficial to all whom the plaintiff proposes to represent." There is no common interest; each seeks his own damage. The suggestion that all might have a common interest in a declaration of misconduct in the course of navigation is answered by the statement that a claim for damage cannot be split up into an abstract proposition and an award of damages. He goes so far as to say: "The claims here are necessarily claims for damages only and therefore no representative action can be brought."

Buckley, L.J., dissents, thinking that a class-action can be brought even where the claims are distinct, substantially applying the test as to joinder of parties.

In *Walker v. Sur*, the plaintiff sought to recover architect's fees from an unincorporated religious body which had erected a hospital. An order of representation was made authorising the four named defendants to defend on behalf of all the members of the Order. This was sought so as to enable the plaintiff, if successful, to reach the property of the religious Order. — In the Court of Appeal this was reversed. Vaughan Williams, L.J., states that the object of the Rule was to make easier the bringing of actions for the enforcement of rights against an unincorporated aggregate of people. "It lies with the Judge to give the authority and if he thinks it a case in which the plain-

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tiff may properly sue the persons that he proposes to sue as people proper to be authorised to defend in such cause or matter on behalf of or for the benefit of all interested then the order may be made." As this did not appear, the order was refused.

Buckley, L.J., points out that without such an order the plaintiff can only obtain judgment against the named defendants and execution against their individual assets. He then says that "we have to determine whether this action ought to go on so that execution could be maintained against all the persons represented. In my judgment that would be impossible. It is simply an action of debt against a large number of individuals, and no judgment could be obtained which would be representative against all of them, there could only be a judgment individually against each of them."

Kennedy, L.J., says ([1914] 2 K.B. at pp. 936, 937): "This is an action of debt, and . . . such an action, where the person or persons sought to be sued are, as here, members of an unincorporated body which cannot itself be sued, will not lie, framed, as this action is sought to be, under the authority given to the learned Judge. I admit that I feel a difficulty in saying what does, and in general terms what ought not to, fall within the terms of this permission; but of the body in the present case we know very little on the affidavits before us, and it is not pretended that, as was the case in the *Taff Vale* case, there are any funds vested in trustees. It is not alleged there are any trustees at all, and the claim is to my mind a claim in which it is sought to make a judgment for payment of money effective against a number of persons who belong to a named society but who have no common fund vested in trustees who could be joined as representing the society." He then points out (p. 937) that the membership is not fixed. "The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract . . . A judgment could not be very well given against one who had ceased to be a member . . . "

The impropriety of any personal judgment operative against one who was not served is also pointed out.

Since then the question has been regarded as placed upon a firm basis. For example, in *Mercantile Marine Service Association v. Toms*, [1916] 2 K.B. 243, an order was refused in an action for libel against an unincorporated society of 15,000

members. The named defendants were the chairman, vice-chairman, and secretary of the guild. It was asked to add the trustees of the funds of the guild to represent the body. Swinfen Eady, L.J., said (pp. 246, 247): "The action is for libel, and the plaintiffs must prove who published the libel, and *prima facie* only those who have published it either by themselves or by their servants or agents or have authorised its publication are liable. The various members of the association may be in a wholly different position. If the members of the management committee were sued, and if in fact they had authorised the publication of the libel, they could raise such defences as might be open to them . . . The other members of the association, if sued, might say that, however defamatory the words complained of might be, they did not authorise their publication. . . . In my opinion this rule is not intended to apply to such a case as this." The Lord Justice then points out that there is no case in which the rule has been applied in the case of a pure tort and that the statement of Lindley, L.J., in *Temperton v. Russell*, that it is not applicable in actions of damages for tort, has never been dissented from; and that, apart from the modification of the one statement that the common interest necessary must be proprietary, the decision is still good law. Pickford, L.J., agrees, but seems careful to avoid the statement that in no case can the Rule be used in an action for tort. He rests mainly upon the fact that the plaintiff had not shewn that he could not obtain an effectual remedy without having the 15,000 members before the Court.

The only other case that I am aware of bearing on the question is *London Association for Protection of Trade v. Greenland Limited*, [1916] 2 A.C. 15, where an unincorporated body was sued in its trade name for libel, and it is said (p. 30) that the Rule cannot be relied on unless it appears in the style of cause that the defendants are sued as representatives. I should add that an order authorising the defendants to represent the class is, by the Rule, equally essential.

The result, in my opinion, is, that in an action to recover damages for tort the Rule cannot be invoked unless it is intended to be alleged that the unincorporated body is possessed of a trust-fund, and such circumstances exist as entitle the plaintiff to resort to that fund in satisfaction of his claim. In such case the trustees may be appointed to represent the general membership in defending the fund.

Where the claim is equitable in its nature, an order may be

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made where under the old Chancery practice it was necessary to have all the members of the class before the Court in some way, and the membership of the class is too large to permit this save by such an order. Where there are many tort-feasors, the plaintiff has an adequate remedy by suing those whom he can shew to be wrongdoers, and from whom he may expect to levy the amount of any recovery. Any individual alleged to be a wrongdoer and to be liable to a personal judgment ought to have an opportunity of defending himself. His interest is several and not in common with other alleged wrongdoers.

The plaintiff's claim here is not very different from that in *Brown v. Lewis* (1896), 12 Times L.R. 455, where the plaintiff recovered damages against the members of the executive committee of a football club upon the grounds of which a defective stand had been erected.

The motion must be dismissed with costs to the defendants in the cause.

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[MASTEN, J.]

[MIDDLETON, J.]

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Covenant—Conveyance of Land—Restriction as to Number of Houses to be Built thereon—Action to Restrain Defendant from Building in Violation of Covenant—Motion for Interim Injunction—Balance of Convenience—Defendant Allowed to Proceed at his own Risk—Defendant not a Party to Covenant—Covenant not Running with Land—Notice of Covenant—Vendors Retaining no Land which could be Protected—Covenant not Part of Building Scheme but for Benefit of Vendors alone.

The plaintiffs sought to restrain the defendant from erecting a building in violation of restrictions contained in the conveyances to him of two lots according to a plan. The restrictive covenant on the sale of each lot was that only one dwelling house should be erected upon it. The defendant was not the original purchaser, but had acquired, by divers mesne conveyances, title to two adjoining lots originally sold to separate purchasers, and was erecting three houses upon the two lots:—

Held, upon a motion for an interlocutory injunction, that, there being difficult questions to be decided at the trial, which ought not to be determined in advance, and the material before the Court on the motion not being sufficient to enable the Court to form a satisfactory opinion on the plaintiffs' rights, the disposition of the motion must turn upon the relative convenience or inconvenience which might result to the parties from granting or withholding the injunction; and in this case the balance of convenience was in favour of the defendant, and the injunction should be withheld, on the clear understanding that the defendant was proceeding at his own risk.

Principles governing the granting of interlocutory injunctions, stated. *Mogul Steamship Co. v. McGregor Gow & Co.* (1885), 15 Q.B.D. 476, and *Dwyre v. Ottawa* (1898), 25 A.R. 121, followed.

Held, at the trial, that the covenant did not run with the land, and the plaintiff could be bound by it only if the case came within the equitable rule expounded in *Tulk v. Moxhay* (1848), 2 Ph. 774.

The defendant was a purchaser with notice of the restrictive covenant, but the vendors had retained no land which could be protected by that covenant—that is, retained and owned at the date when it was sought to enforce the covenant—and they were not entitled to enjoin the defendant.

London County Council v. Allen, [1914] 3 K.B. 642, and *Page v. Campbell* (1921), 61 Can. S.C.R. 633, followed.

There was not a building scheme—the covenant was intended to be for the benefit of the vendors alone: *Reid v. Bickerstaff*, [1909] 2 Ch. 305.

MOTION by the plaintiffs for an interim injunction restraining the defendant from committing a breach of a building covenant.

October 19. The motion was heard by MASTEN, J., in the Weekly Court, Toronto.

T. P. Galt, K.C., for the plaintiffs.

E. F. Raney, for the defendant.

November 4. MASTEN, J.:—This is a motion for an interlocutory injunction to restrain the defendant, until the trial or other final disposition of this action, from committing a breach of the following covenant:—

“And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, covenants with the parties of the first part, their heirs, executors, administrators, and assigns, that for the period of 15 years from the 1st day of August, 1909, he (the party of the second part), his heirs, executors, administrators, and assigns, will not erect or permit to be erected, on said lands or any portion thereof, any buildings except one dwelling house and stable, such dwelling house to be detached, and to cost to erect not less than \$3,000, and the stable to cost to erect not less than \$300; the exterior walls of such dwelling house and stable not to be constructed of any other material than brick, stone, tiles, or iron; and the said house shall only be used for residential purposes, the said dwelling house and stable or any portion thereof shall not be placed within 20 feet from Hurndale avenue, except that a verandah, oriel or bay window, or eaves, may be constructed in front of the said house, but no portion of said verandah or steps thereto shall be erected, placed, or maintained within 8

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feet of the street line, and the oriel window or bay window or eaves shall not project in front of the main building of the house a greater distance than 4 feet; and this covenant shall be construed as a covenant running with the land.”

The above covenant was made in favour of the present plaintiffs by one Thomas Jeffery in respect of lot 41 on registered plan 1463, and by Charles S. Howarth in respect of the adjoining lot, 42, on the same plan. It is admitted that the lands in question, being part of these two lots, were acquired by the defendant with full notice and knowledge of the above covenant. It is also admitted that the defendant has erected one house on lot 41 and another on lot 42, and that he is now proceeding to erect a third house between the two. The plaintiffs assert that this is a breach of the negative covenant above quoted, and have brought this action to enforce the covenant, and they now claim an interlocutory injunction to restrain any further building until the trial.

The defendant, while admitting the covenant and that he took the lands with notice, sets up:—

(1) That the lots were sold as part of a building scheme covering these and neighbouring lands, and were purchased and paid for on an implied covenant by the vendors (the plaintiffs) that all the lots covered by the building scheme should be sold subject to a like covenant; that the plaintiffs on their part have broken this implied covenant, destroyed the building scheme, and in consequence are personally disqualified from maintaining the present action to enforce the express covenant above mentioned.

(2) That the character of the district has so altered since 1912 that the covenant is no longer applicable.

(3) That, in any case, the damage is not shewn to be irreparable, and, if the plaintiffs' claim is valid, damages will afford an adequate remedy.

The plaintiffs in reply allege:—

(1) That there never was a building scheme, but that each covenant was independent of the other, and that it was within the discretion of the plaintiffs to omit the covenant or to modify or vary it in any case.

(2) That, even if there was a building scheme, the variations from it have been so trifling that they failed to produce the result contended for by the defendant.

(3) That the character of the district has not altered in the manner contended for.

The motion was fully and ably argued on the merits touch-

ing all these questions; but it appears to me that, before dealing with the merits, it is necessary to consider a preliminary question of practice with respect to the granting of interlocutory injunctions. It does not always follow that, because a perpetual injunction may be granted at the trial, therefore an interlocutory injunction before the trial will also be granted. The general principle is thus stated in Halsbury's Laws of England, vol. 17, para. 480:—

“In cases of interlocutory injunctions in aid of the legal right, all the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere without waiting for the legal right to be established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the discretion of the Court ought in all cases to be regulated. It is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events: it is quite sufficient if the Court finds a case which shews that there is a substantial question to be investigated, and that matters ought to be preserved *in statu quo* until that question can be finally disposed of.”

And in note (q) to the above paragraph it is added:—

“In the Chancery Division the modern tendency, however, is to avoid trying the same question on two occasions, and in ordinary cases only to grant interlocutory injunctions where the right to relief is clear.”

It is true that, where parties to a contract, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, proof of damage is not necessary as a general rule in order to entitle the plaintiff to a perpetual injunction to restrain the breach thereof. But, as I shall point out hereafter, if difficult questions of fact present themselves on an application for an interlocutory injunction, other considerations may prevail.

The rule was long ago established, and has been consistently applied, that the Court will not grant an injunction on the ground that it will do the defendant no harm: *Coffin v. Coffin* (1821), Jac. 70, 72; *Strousberg v. Linklaters* (1888), 32 Sol. J. 751.

In *Mogul Steamship Co. v. McGregor Gow & Co.* (1885), 15 Q.B.D. 476, the plaintiffs applied for an interlocutory injunction to restrain boycotting. Lord Coleridge, C.J., delivered the judgment of an appellate Court consisting of himself and Lord Justice Fry, and his remarks on the granting of an interlocu-

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tory injunction are so pertinent to the circumstances here existing that I quote them at some length (pp. 484, 485, 486, and 487) :—

“Now, my learned brother’s experience in matters of this sort is much greater than my own; and, after much anxious discussion, we have come to the conclusion that this is not a case for the issuing of an interlocutory injunction, and for many reasons. First of all because, although conceivably, as I have already stated, the cause of action is one within the limits of legal idea and capable of proof, yet every one must see that it is a case in which the proof is extremely difficult; and here it is that the case put forward by the defendants comes in with great weight . . . Whether they (the plaintiffs) say so truly—I do not mean veraciously or accurately—is altogether another matter. They say it; and, as I observed with regard to the case of the plaintiffs, without deciding that they are right, it is plain they may be so: and so, without deciding the case against the defendants, it is plain that they also may be right. It is entirely, as it seems to us, a matter to be decided bye-and-bye before a jury or a judge or whatever tribunal may be called upon to determine which of the two contentions is made out in point of fact. That being so, it would be a very strong thing for this Court to anticipate the decision of so doubtful a matter by the issuing of an interlocutory injunction.

“In the next place, it is to be considered, that, even assuming that the plaintiffs are right in their contention, it will be competent to the jury at the trial to award, and I have no doubt they will award, the plaintiffs abundant damages to compensate them for the injury that they may have sustained at the hands of the defendants. I have always understood, and I am confirmed in that understanding by the larger experience of Lord Justice Fry, that that is almost of itself a reason for not issuing an injunction prior to the trial of the action. If the plaintiffs establish their case by the verdict of the jury or the decision of the judge, they will get all they are entitled to.

“Next, this does not appear to me to be a case in which, as I was at one time inclined to think, the plaintiffs can sustain irreparable injury by our declining to grant the relief prayed. It may be that they will suffer some damage; it may be that they will for a time have a difficulty in carrying on their China trade, or may have to carry it on at a loss. But injury of that sort differs altogether from the injury which is called ‘irreparable,’ to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue from

this Court. For instance, if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable, and cannot be compensated in damages. It is in cases of that nature that an interim injunction issues. The injury here, if it be made out, obviously is not one of that character.

" . . . The injury complained of is not irreparable; there is no infringement of any right which affects the enjoyment of life; no restraint of freedom of personal action; none of those considerations which besides the head of irreparable injury have induced the Courts to interfere by injunction before the trial of the action."

In the present case, the covenant being clear and the erection of the building being admitted, if that were all that appeared, the interlocutory injunction ought, I think, to be granted, even though no irreparable damage is shewn. But that is not all: the defendant sets up grounds for contending that the covenant is wholly gone, or, in the alternative, is unenforceable by these plaintiffs, and, without deciding that he is right, it is manifest that he may succeed on those questions at the trial. I understand the principle to be that where the affidavit-evidence on the motion leaves the matter so much in doubt that the Court must see there is a serious question of difficulty to try, then the matter of convenience becomes of paramount importance.

Here the legal right of the plaintiffs depends on evidence of facts which can only appear satisfactorily at the trial. The present material, ample though it is in many respects, is yet not sufficiently clear to enable me to form any satisfactory opinion on the plaintiffs' rights. Under such circumstances the rules governing applications of this kind are well settled, and are as stated by Moss, J.A., in *Dwyre v. Ottawa* (1898), 25 A.R. 121, at p. 130:—

"Where the legal right is not sufficiently clear to enable the Court to form an opinion it will generally be governed in deciding an application for an interim injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the order.

"And where it appears that greater danger is likely to result from granting than withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will not be granted."

The several issues arising in this action, as indicated in the beginning of this judgment, as to whether there was in fact a building scheme and as to whether the plaintiffs have disqualified themselves and as to whether the character of the locality

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has changed, are all peculiarly dependent upon the evidence which will be adduced at the trial. Considering the situation which I have just indicated, and that no immediate damage is shewn to be likely to result to the plaintiffs between the present time and the trial of the action, if the injunction order is refused; considering that the covenant in question has less than 3 years more to run, and that it may at the trial be determined that the plaintiffs can be amply compensated in damages; considering also that the defendant from the date of the issue of the writ proceeds at his own risk, and that if the plaintiffs are ultimately found to be entitled to the injunction as prayed, the defendant may and probably will be ordered to tear down and remove the building in question (*Daniel v. Ferguson*, [1891] 2 Ch. 27, and *Von Joel v. Hornsey*, [1895] 2 Ch. 774)—I think I ought to decline to determine the issues on which the plaintiffs' rights depend, and on the balance of convenience to find in favour of the defendant, on the clear understanding that he is proceeding at his own risk.

The order should therefore be that, upon the defendant undertaking to facilitate the speedy trial of the action, this motion is enlarged to the trial without any injunction in the meantime. Order accordingly.

December 19. The action was tried by MIDDLETON, J., without a jury, at a Toronto sittings.

Galt, K.C., for the plaintiffs.

Raney, for the defendant.

December 31. MIDDLETON, J.:—Action for an injunction to restrain the erection of a building in violation of restrictions contained in two conveyances of lots fronting on Hurndale avenue. The restrictive covenant on the sale of each lot provides that only one dwelling house shall be erected upon it. The defendant was not the original purchaser, but has acquired, by divers mesne conveyances, title to two adjoining lots originally sold to separate purchasers, and is erecting three houses upon the two lots. He first built one house on each lot, leaving as much land between as practicable, and then asked to be relieved from the restriction so that he might place a third house between the others. This was refused, and he then took the position that he was not bound by the covenant, and started to build. A motion for an injunction followed and he was allowed to proceed entirely at his own risk. Pending the hearing the house has been erected at a cost, it is said, of \$12,000. If the

plaintiffs are in the right, as I understand the law, I must order the destruction of the building.

"If there is a negative covenant the Court has no discretion to exercise. If the parties for a valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that the thing shall not be done. In such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience or of the amount of damage or injury, it is the specific performance by the Court of that negative bargain which the parties have made:" *Doherty v. Alman* (1878), 3 App. Cas. 709, 720, followed in *McEacharn v. Colton*, [1902] A.C. 104.

In this case the defendant is not a party to the covenant, and it does not run with the land. He can only be bound by it if the case be within the equitable rule expounded in *Tulk v. Moxhay* (1848), 2 Ph. 774. That the defendant is a purchaser with full notice of the covenant admits of no doubt, but recent cases have demonstrated that "if the vendor has retained no land which can be protected by the restrictive covenant, the basis of the reasoning of the judgment is swept away:" *London County Council v. Allen*, [1914] 3 K.B. 642, at p. 654. This does not mean "retain at the date of the covenant," but "retains and owns at the date when it is sought to enforce the covenant." This law has been recently applied in *Page v. Campbell* (1921), 61 Can. S.C.R. 633.

Here, fortunately for the defendant, the plaintiffs have parted with all the land which the restrictive covenant was intended to benefit and protect.

In case it should hereafter be deemed of importance, I find there was not a "building scheme," as that expression is understood in the cases. The covenant was intended to be for the benefit of the vendors alone: *Reid v. Bickerstaff*, [1909] 2 Ch. 305.

The action fails. Though sorely tempted, I can see no reason for refusing costs. Such costs will not cover any relating solely to the attempt to shew a building scheme and release by reason of the vendors' conduct toward other purchasers.

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[MIDDLETON, J.]

RE FITZGIBBON.

Will—Construction—Trust-fund—Gift of Income to Forward Work of Specified Charitable Society—Cesser of Work of Society after Death of Testatrix—Absence of General Charitable Intention—Cy-près Doctrine Inapplicable—Claim of Crown—Fund Falling into Estate of Testatrix.

The testatrix, being greatly interested in a certain society, called the "Women's Welcome Hostel," which carried on the work of receiving young women arriving from Great Britain and Ireland with the intention of entering domestic service, providing them with temporary lodging, and securing suitable employment for them, by her will directed the setting apart of a trust-fund "to form an annual prize to be given to any domestic going through the Hostel who has remained in one place three years or upwards, giving satisfaction to her employers, to be judged by the managers of the Hostel and the employer." After the death of the testatrix, the work of the Hostel ceased, owing to the Government having undertaken the receiving and placing of women immigrants, and the society became amalgamated with another; the amalgamated body made no claim upon this fund. In the winding-up of the estate of the testatrix, it was found that there was not enough money to answer all the legacies; and the legatees maintained that this fund reverted to the estate and should be used, as far as it would go, to make up the deficiency:—

Held, that no such general intention on the part of the testatrix to devote the fund to charity as to make the cy-près doctrine applicable was shewn: the Hostel itself was not the beneficiary; the income, and not the fund itself, was the thing vested in the ultimate beneficiary; the only object of the trust was to forward the work undertaken by this particular institution, and that work had ceased.

Semble, had the fund been vested in the Hostel, the principle laid down in *In re Stevin*, [1891] 1 Ch. 373, would have applied, and the Crown would have been entitled to take the fund, not by virtue of the cy-près doctrine, but because it would then have been effectually devoted to charity, and on the failure of the primary purpose it would have been applicable to some other purpose to be ascertained by the Court.

In re University of London Medical Sciences Institute Fund, [1909] 2 Ch. 1, *In re Wilson*, [1913] 1 Ch. 314, and *In re Rymer*, [1895] 1 Ch. 19, referred to.

The fund should be distributed among the legatees.

MOTION by the executors of the will of Mary Agnes Fitzgibbon, deceased, upon originating notice, for an order determining the question whether certain moneys directed by the will of the deceased to be set apart as the Fitzgibbon trust fell into the estate, upon the failure of the object of the trust (a charitable one), and so should be distributed among the various legatees who had been called upon to abate, or whether the fund was so dedicated to charity that it should be administered in accordance with the cy-près doctrine.

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January 6. The motion was heard by MIDDLETON, J., in the Weekly Court, Toronto.

Gerald M. Malone, for the executors.

D. C. Ross, for the Attorney-General for Ontario.

F. W. Harcourt, K.C., for the legatees.

January 10. MIDDLETON, J.:—Miss Fitzgibbon died on the 17th May, 1915, having first made a will, dated the 2nd April, 1915, which has been duly admitted to probate, and has already been construed by me upon an application resulting in an order of the 14th October, 1916: *Re Fitzgibbon* (1916), 11 O.W.N. 71.

The provision of the will now calling for interpretation provides that a fund which amounts to \$953 be "set apart in trust to form an annual prize to be given to any domestic going through the Hostel who has remained in one place three years or upwards, giving satisfaction to her employers, to be judged by the managers of the Hostel and the employer of the said recipient, this to be known as the Fitzgibbon trust."

Miss Fitzgibbon was one of the founders of the institution known as the "Women's Welcome Hostel," and upon the former application it was determined that this was the institution intended to be benefited by the clause in question. The aim and object of this institution was the receiving of young women arriving from the old country, contemplating taking positions in domestic employment, who came to Canada under the auspices of approved emigration societies. The institution aimed to provide for temporary lodging and the securing of suitable employment for all young women of this type, and the late Miss Fitzgibbon devoted herself to the carrying on of this charitable work.

Owing to some change in the mode of supervising emigration by the Dominion Government, the association was found to have survived its usefulness, and on the 2nd November, 1920, at a meeting of the board, the following resolution was passed:—

"Whereas the work of the Women's Welcome Hostel has been obliged to cease owing to the Government having undertaken all placing and receiving of women immigrants:—

"Be it resolved that the board of the Women's Welcome Hostel amalgamate with the Girls' Friendly Society and transfer to the central council of the Girls' Friendly Society in Canada all the property known as 52 St. Alban's street."

This resolution being carried, the proposed arrangement has gone into effect.

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The Girls' Friendly Society is not carrying on such work as to enable it to make any claim upon the fund, and that society has expressly disclaimed any right to benefit by it.

In the winding-up of the estate, there was not enough money to answer all the legacies given by the late Miss Fitzgibbon, and upon the earlier application it was held that this fund and the other legacies should abate proportionately. The legatees now claim that this fund reverts to the estate, and should be used, *quantum valeat*, to make up the deficiency upon their legacies. The Attorney-General, on the other hand, contends that this is a good charitable gift; and that, the mode of user pointed out by the testatrix having failed, it is the duty of the Court to devise a scheme by which it may be administered *cy-près*.

There are, no doubt, other institutions carrying on work among the same class of young women, who would be glad to avail themselves of this fund. The question, however, must first be determined whether there was any such general charitable intention on the part of Miss Fitzgibbon as to make the doctrine relied upon applicable, for the residuary legatees contend that there was no general charitable intention, but only an intention to benefit the work being carried on by the Women's Hostel.

I have come to the conclusion that the case is not brought within the doctrine relied upon.

It is of importance, in the first place, to observe the exact terms of the gift. The Hostel itself is not the beneficiary, but the fund is to remain with the testator's trustees, and the annual income is to be given to the young woman immigrant who has gone through the Hostel and remained in one place for three years, giving satisfaction to her employers, her fitness being determined by the board of that institution. The income and not the fund itself is the thing that is vested in the ultimate beneficiary. Had the fund been vested in the Hostel, the principle laid down in *In re Slevin*, [1891] 1 Ch. 373, would have applied, and the Crown would have been entitled to take the fund, not by virtue of the *cy-près* doctrine, but because it would have then been effectually devoted to charity, and on the failure of the primary purpose it would be applicable to some other purpose to be ascertained by the Court.

Although the Hostel is not the beneficiary directly, the purpose of the testatrix, as I gather from the words I have quoted, was to forward the particular work with which she was so intimately concerned. There was not a general intention to devote this fund to charity. The main and only object was to forward the work undertaken by this particular institution.

In discussing this question, a rule is formulated in Theobald on Wills, 7th ed., p. 373:—

“If the gift is for a charitable purpose, the question is, is the testator’s intention to promote some specific and well-defined purpose, and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way?”

This statement has the approval of Lord Justice Kennedy in *In re University of London Medical Sciences Institute Fund*, [1909] 2 Ch. 1. I am ready to adopt the words of the Lord Justice in that case, as applicable to the case before me (p. 9):—

“Here there is no doubt that the gift was for a charitable purpose; and it seems equally clear—and but for the argument addressed to us I should have thought it impossible to argue otherwise—that the testator’s intention in making this gift . . . was for the specific and well-defined purpose of the Institute . . . and for no general or other purpose whatever.”

The judgment of Parker, J., in the case of *In re Wilson*, [1913] 1 Ch. 314, illuminates the situation. He points out that the cases fall into two classes: first, those in which the gift is for a particular charitable purpose, but it is possible to say that the paramount intention is to give the property for a general charitable purpose, and to regard the particular charitable purpose mentioned as a mere graft upon the general gift, indicating the testator’s desire as to the mode in which the general gift is to be carried into effect. Finding this good general gift, and the particular purpose having failed, that direction is to be eliminated from the will, and the valid general gift will then remain.

The second class of cases are those “where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out the particular purpose, the whole gift is held to fail.”

Applying the reasoning in that case to the case in hand, I am confirmed in the view that there was no general intention to devote this fund to charity, but that here the only intention was to forward the work of the Hostel, and to confer a benefit upon those who had been aided by it; and, this failing, the gift fails and the fund must now be distributed among the legatees. If the intention to benefit the Hostel is read out of this will, it is impossible to find a good general charitable gift.

The decision of Chitty, J., affirmed by the Court of Appeal,

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Middleton, J. in *In re Rymer*, [1895] 1 Ch. 19, leads to the same conclusion.
 1922. The costs of all parties may well be paid out of the fund
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[MULOCK, C.J.Ex.]

Jan. 13.

REX V. HORNING.

Criminal Law—Trial of Prisoner on Charges of Conspiracy to Rob and Robbery—Previous Conviction for Receiving Part of Stolen Money—Whether Bar to Conviction on Subsequent Charges—Res Judicata.

The prisoner, having been convicted of unlawfully receiving stolen money, knowing it to have been stolen, was subsequently indicted, tried, and found guilty of conspiracy to rob and robbery. Money received by him in respect of which he was first convicted was part of the fruits of the robbery which he was afterwards found guilty of conspiring to commit and of committing:—

Held, that his conviction of receiving was not a bar to his conviction of robbery and of conspiracy to rob.

The test was not whether the facts before the Court at the first trial were the same as at the second, but whether the prisoner could have been properly convicted on the first trial of the offences of conspiracy and robbery. At the first trial he was not in peril in respect of either of these offences.

Regina v. King, [1897] 1 Q.B. 214, distinguished.

Rex v. Barron, [1914] 2 K.B. 570, referred to.

On the 7th March, 1921, in the County Court Judge's Criminal Court of the County of Wentworth, George Horning elected to be tried upon and pleaded "guilty" to the charge that he "on the 23rd day of December, 1920, at the township of Binbrook, in the said county, did unlawfully receive and have the sum of \$8 of the moneys and property of Wilfred Laidman, then well knowing the same to have been theretofore unlawfully stolen," and for the offence was sentenced to 4 months' imprisonment.

Subsequently, at the assizes held in Hamilton in the month of November, 1921, Horning was indicted on two counts:—

First, that he did on the 23rd day of December, 1920, conspire with others to commit robbery at Binbrook.

Second, that he did on the 23rd day of December, 1920, commit robbery at Binbrook.

Upon these two counts Horning was tried before MULOCK, C.J. Ex., and a jury, and found guilty on both counts.

The evidence adduced at the trial at the assizes was, that

Horning and 4 others had, in the afternoon of the 23rd December, 1920, conspired to rob 3 stores, one being a store at Binbrook; that, in pursuance of this conspiracy, the 5 conspirators drove from the city of Hamilton to Binbrook in a motor vehicle. Spaulding, one of the 5, drove the vehicle; Martin and Horning pointed out the way to Spaulding, each of them being familiar with a part of it; Meharg and Dickenson went into the store, after Spaulding had inspected the premises; Spaulding, Martin, and Horning sat in the vehicle awaiting the return of Meharg and Dickenson; Dickenson took \$40 from the till in the store and handed it to Meharg; these two then returned to the vehicle, which was rapidly driven away; Meharg divided the money practically equally among the 5; Horning received \$8.

It was for the offence of receiving this sum of \$8 that Horning pleaded "guilty" in the County Court Judge's Criminal Court.

Upon Horning's trial at the assizes he did not plead *autrefois convict*.

At the assizes, upon the verdict of the jury being recorded, a motion was made on behalf of the prisoner (Horning) in arrest of judgment or to stay proceedings upon the verdict.

C. W. Bell, K.C., for the prisoner. The indictment for conspiracy to rob at Binbrook or elsewhere and for robbery at Binbrook is not sustainable against the prisoner. The former proceedings are a bar to an indictment charging either conspiracy or robbery. The same facts having been passed upon in the lower court, the defence of *res judicata* is a complete defence, even when the charge upon which the prisoner is subsequently indicted is an entirely different charge: *Regina v. King*, [1897] 1 Q.B. 214, 218, 219. The defence of *res judicata* was not raised in *Rex v. Barron*, [1914] 2 K.B. 570, nor in *Rex v. Tonks*, [1915] W.N. 387; in both the Court had to deal only with *autrefois acquit* or *autrefois convict*. The decisions in *Regina v. Stanton* (1851), 5 Cox C.C. 324, and *Regina v. Elrington* (1861), 1 B. & S. 688, are in line with King's case. See also *Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 381; *Rex v. Quinn* (1905), 11 O.L.R. 243, 10 Can. Crim. Cas. 412. Even if the offence of conspiracy in the present case became complete before the other offence was committed, the facts necessary to support the charge of conspiracy had already been passed upon, and the prisoner could not again be placed upon trial on those facts. The defence of *res judicata* need not be raised before verdict.

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Daniel O'Connell, K.C., for the Crown. Neither the plea of *autrefois convict* nor that of *res judicata* is applicable in the circumstances. To establish *res judicata* the prisoner must shew that the essential ingredients in both cases are the same — in other words, that the same facts would have to be proved in each case. To prove the charge of receiving, it was necessary to shew only that the money was stolen and that afterwards the prisoner received it and kept it, knowing it to be stolen. The relevant facts to be adduced in evidence for this purpose would be the robbery, in which the prisoner himself was a participant, the subsequent delivery of part of the money to him by the person who had received it from him who had actually taken it, and the acceptance and retention of it with guilty knowledge. Upon the conspiracy charge all that was necessary to prove was that the 5 men had agreed to commit the robbery. The evidence of what they did in pursuance of the conspiracy was simply corroborative of the main fact, that they had conspired to commit the crime. Upon the charge of robbery it was necessary to shew only that the robbery was committed and that the prisoner participated in it. His going in the motor vehicle, his directing the driver, and his waiting in the vehicle, were relevant facts for the purpose of shewing his participation, and were different from the essential facts in the other cases. Each case was different from each of the other two. The essential facts necessary to constitute the offence of receiving were not the material facts necessary to support convictions in the other two cases. Even where the facts are the same, if the offences are different, the prisoner may be placed on trial for each of the different offences: *Rex v. Barron*, [1914] 2 K.B. 570, 575. See also *Regina v. Hughes* (1860), Bell C.C. 242, which is decisive against the prisoner; *Regina v. Hodge* (1898), 2 Can. Crim. Cas. 350; *Regina v. Lamoureux* (1900), 4 Can. Crim. Cas. 101. The cases relied on by counsel for the prisoner are inapplicable.

January 13, 1922. MULOCK, C.J. Ex.:—The prisoner was tried before me at the Wentworth assizes, held in November, 1921, and found guilty of two offences, namely, conspiracy to rob and robbery. The counts in the indictment upon which he was found guilty were in the following words:—

(1) "That at the city of Hamilton, in the county of Wentworth, on or about the 23rd day of December, 1920, George Horning did conspire, combine, confederate, and agree to and with Wilfred Meharg, Edward Dickenson, Clarence Spaulding, and Lloyd Martin, with and by threats and acts of violence,

on the 23rd day of December, 1920, then and there to be used by them to and against the persons of those who might be in custody of the money and property in certain stores in the county of Wentworth to prevent resistance, violently to steal, in the presence of the said persons so in custody of the property in the said stores against the said custodians' will, the said money and property then and there in said stores."

(2) "That afterwards at the township of Binbrook, in the county of Wentworth, on the 23rd day of December, 1920, the said George Horning, in pursuance of the said conspiracy, did then, and being together with the said Wilfred Meharg, Edward Dickenson, Clarence Spaulding, and Lloyd Martin, with and by means of violence then and there used by them to and against the person of Edward Whitworth, of the said township of Binbrook, to prevent resistance, violently steal, in the presence of the said Edward Whitworth and against the said Edward Whitworth's will, moneys of Wilfred Laidman to the amount of \$42, contrary to the Criminal Code."

For the defence it was proved that on the 23rd day of February, 1921, the prisoner was charged before the Police Magistrate, at Hamilton, in the said county, "that he did on the 23rd day of December, 1920, at the township of Binbrook, in the county of Westworth, unlawfully steal the sum of \$40, the moneys and property of William Laidman," and that on the said charge he was committed for trial by the Police Magistrate, and was on the 7th March thereafter tried by the Judge of the County Court of the County of Wentworth, and on his trial was charged that he had "unlawfully received the sum of \$8, the money and property of William Laidman, well knowing the same to have been stolen."

Upon his arraignment upon this charge, he was found guilty, and was sentenced to 4 months' imprisonment, and it was contended on behalf of the prisoner that his conviction before the said County Court Judge was a bar to conviction on the charges of conspiracy and robbery for which he was tried before me and found guilty.

The prisoner's counsel rested this contention not on the ground of *autrefois convict*, but on the ground that the facts which were in evidence before the Police Magistrate and the County Court Judge were the same as those in evidence at the prisoner's trial on the charges of conspiracy and robbery, and that his conviction by the County Court Judge must be considered as an adjudication in respect of any other offence disclosed by the evidence adduced before me.

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In support of this argument, the prisoner's counsel relied on *Regina v. King*, [1897] 1 Q.B. 214. In my opinion, that case is not open to so sweeping an interpretation. There the prisoner had been convicted upon an indictment charging him with obtaining credit for goods by false pretences, and was subsequently convicted upon a further indictment charging him with larceny of the same goods. The view of the Court of Criminal Appeal appears to have been that the offences charged were substantially the same, and that, the prisoner having been convicted of obtaining goods by false pretences, it was not fair that he should later be tried for an offence only technically different. It is true that Hawkins, J., is reported as saying (p. 218), "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts;" but he adds, "The offences are practically the same, though not their legal operation." Apparently the substantial identity of the offence was the *ratio decidendi* in *Regina v. King*. See *Rex v. Barron*, [1914] 2 K.B. 570.

Dealing then with the present case, I am of opinion that the test is not whether the facts in the case before the County Court Judge and in the present case are the same, but whether the prisoner could have been properly convicted on the trial before the County Court Judge of the said offences of conspiracy and robbery. Neither the charge of theft before the magistrate nor that of unlawfully receiving, to which on his trial before the County Court Judge he pleaded "guilty," includes either the offence of conspiracy to rob or of robbery. On the charge of theft and receiving he could not have been properly convicted of the major offence of robbery (the lesser does not include the greater offence) nor of a wholly different offence, that of conspiracy to rob. Thus, before the County Court Judge he was not "in peril" in respect of either of these offences, and his conviction of receiving is not a bar to his conviction of robbery and conspiracy to rob.

I therefore dismiss the prisoner's application. Y

[IN CHAMBERS.]

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Jan. 19.

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Canada Temperance Act—New Provisions Added by 10 Geo. V. ch. 8—Sec. 154 (1) (c)—“Transportation of Intoxicating Liquor through Province” except by Water or Railway Forbidden—Conveying Liquor Made in Ontario to Place out of Ontario by Truck—“Transportation”—“Exportation”—Magistrate’s Conviction—Motion to Quash—Want of Jurisdiction—Misinterpretation of Statute—Certiorari—Sec. 148 of Act—Offence against Act—Supervising Power of Court.

The defendant was convicted by a magistrate of transporting intoxicating liquor through the Province of Ontario by truck contrary to sec. 154 (1) (c) of the Canada Temperance Act, as enacted by the amending Act 10 Geo. V. ch. 8. By para. (c) it is provided that “the carriage or transportation of intoxicating liquor through such Province shall only be by means of a common carrier by water or by railway and not otherwise.” The evidence shewed that what the defendant was doing, when stopped by the prosecution in which he was convicted, was conveying intoxicating liquor, lawfully made in Ontario, to a place or places out of Ontario, by land, but not by railway:—

Held, that para. (c) applies only to “carriage *through* such Province”—“transportation;” and not to carriage *from* a Province—“exportation.”

The conviction was bad; and jurisdiction could not be conferred by a misinterpretation of any enactment upon which jurisdiction depended.

Section 148 of the Canada Temperance Act, R.S.C. 1906, ch. 152, provides that no conviction in respect of any offence against Part II. of the Act shall be removed by *certiorari*. This conviction had been brought before the Court by *certiorari* proceedings:—

Held, that the applicant had not been convicted of an offence against Part II. of the Act or any other part of it, or of any other “temperance” or “liquor” law; and even express words do not take away the supervising powers of the Court when there is want of jurisdiction in the inferior court.

And the conviction was quashed.

MOTION to quash a conviction of the defendant, by a magistrate, for an offence against the Canada Temperance Act.

January 13. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

James Haverson, K.C., for the defendant.

F. P. Brennan, for the magistrate.

January 19. MEREDITH, C.J.C.P.:—Although the argument of this motion has covered the whole field of controversy as to the validity or invalidity of the mixed legislation—federal and provincial—respecting intoxicating liquors, the validity or invalidity of the conviction in question can, in truth, be well and easily determined upon a single question, which covers but a

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very small part of that whole field.

The offence with which the applicant was charged, and of which he has been convicted, is that he "did transport liquor through the Province of Ontario by truck . . . contrary to para. (c) of section 154 (1) of the Canada Temperance Act, as enacted by the amending Act 10 Geo. V. ch. 8 (Dom.)"

That enactment provides that:—

"(c) The carriage or transportation of intoxicating liquor through such Province shall only be by means of a common carrier by water or by railway and not otherwise . . . "

That which the applicant was doing, when stopped by this prosecution in which he has been convicted, was conveying intoxicating liquor, lawfully made in this Province, to a place or places out of the Province, by land, but not by railway.

It is more than difficult for me to understand how the convicting magistrate could have considered that such an act is within the provisions of para. (c): and the magistrate's reasons for convicting give me no aid.

Goods may be carried into a Province—imported; may be carried from one place to another within a Province; may be carried through a Province—transported; and may be carried from a Province—exported.

Paragraph (c), in the plainest words, applies only to carriage "through such Province"—"transportation." Paragraph (c) deals with the bringing of such liquors into such a Province: and the Ontario Temperance Act deals with their carriage within that Province: nothing in legislation of this character interferes with the export of them: they may not be sent into another Province contrary to the provisions of para. (a); not because they shall not be exported, but because they shall not be so imported.

The first section added by the amending Act (sec. 152) makes plain the reasons for its enactment, in these words: "That the importation and the bringing of intoxicating liquors into such Province may be forbidden."

The Legislatures seem to have looked upon such liquors as vipers which they—St. Patrick-like—should banish: and, that being so, their export should be aided and hastened, hindering should be out of the question.

Obviously, as it seems to me, there is no ground or reason upon which it can be even plausibly contended that such a case as this is within any of the provisions of the enactment in question, or illegal under any such laws. The conviction, in my opinion, is, upon the admitted facts, plainly bad: and jur-

isdiction cannot be conferred by a misinterpretation of any enactment upon which jurisdiction depends.

But, although the conviction is here, in *certiorari* proceedings, and there is no motion to quash them, it was said, and was argued without objection, that such a conviction may, notwithstanding, stand and be enforced: that the Canada Temperance Act has taken away all the rights of this Court to quash such a conviction, however bad it may be. There is, however, in my opinion, nothing to support any such contention. It should be deplorable if there were.

Section 148 of the Canada Temperance Act, R.S.C. 1906, ch. 152, provides that no conviction in respect of any offence against Part II. of the Act shall be removed by *certiorari*. That of which the applicant has been convicted is not an offence against that part of the Act or any other part of it, or of any other "temperance" or "liquor" law. And, apart from this, the general rule has always been that even express words do not take away the supervising power of this Court when there is want of jurisdiction in the inferior court. It is admitted that no appeal lies against the conviction. Counsel have dealt with all these matters in an amicable, if not altogether regular, manner, and I am following them. —

The conviction must be quashed.

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N B Judge Ruling -

†

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[IN CHAMBERS.]

Jan. 19.

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† *Discovery—Petition of Right—Affidavit of Documents—Right of Suppliant as against Crown—Rules 348, 738-750—"Action"—Judicature Act, sec. 2 (a).*

In a cause in the Supreme Court of Ontario, commenced by petition of right, against the Crown, the suppliant sought discovery, under Rule 348, by an affidavit of documents made by some officer on behalf of the Crown:—

Held, in view of the changes in the Rules made in the consolidation of 1913 (see the group of Rules 738 to 750 and especially Rule 744), supported by the enactment contained in sec. 2 (a) of the Judicature Act, R.S.O. 1914, ch. 56, that the word "action" means a civil proceeding begun in such manner as may be prescribed by the Rules, as well as by writ, and in view of other circumstances, the general Rules respecting production of documents are, subject to the control of the Court, applicable to the Crown, as well as to the suppliant, in an "action" commenced by petition of right.

The rule laid down in *Attorney-General v. Newcastle-upon-Tyne Corporation*, [1897] 2 Q.B. 384, 395, and *Thomas v. The Queen* (1874), L.R. 10 Q.B. 44, is no longer applicable.

History of the legislation and Rules affecting the procedure in causes begun by petition of right.

The suppliant was *held*, entitled to discovery, but of a limited character only.

AN appeal by the Crown from an order of the Master in Chambers requiring an affidavit of documents to be filed by the Crown in a cause in the Supreme Court of Ontario commenced by petition of right.

January 13. The appeal was heard by MEREDITH, C.J.C.P., in Chambers.

Edward Bayly, K.C., for the Crown.

Frank Arnoldi, K.C., for the suppliant.

January 19. MEREDITH, C.J.C.P.:—The question involved in this appeal is: whether, in proceeding upon a petition of right, the suppliant is entitled to any such "discovery" as that provided for in Rule 348.*

Unless that Rule is in some way applicable to such a case, the suppliant cannot have any such aid in the prosecution of

*348. Each party, after the defence is delivered, or an issue has been filed, may by notice require the other within 10 days to make discovery on oath of the documents which are or have been in his possession or power, relating to any matters in question in the action; and produce and deposit the same with the proper officer for the usual purposes. A copy of such affidavit shall be served forthwith after filing.

his claim: the general rule was: "that the Crown is entitled to full discovery, and that the subject as against the Crown is not:" per Rigby, L.J., in the case of *Attorney-General v. Newcastle-upon-Tyne Corporation*, [1897] 2 Q.B. 384, at p. 395.

The question was pointedly raised and determined in the case of *Thomas v. The Queen* (1874), L.R. 10 Q.B. 44. The Petitions of Right Act, 1860, was, and had been for some length of time, in force in England when that case was decided; and it was contended that discovery of documents was included in the provisions of its seventh section; but the answer of Cockburn, C.J., to that contention was: that, if it had been intended to extend the law as to the discovery of documents to the case of petitions of right, there would have been inserted some enactment saying that an officer should answer, as in the case of bodies corporate: see *Tomline v. The Queen* (1879), 4 Ex. D. 252.

The seventh section of the Act of 1860 provided that nothing in the Act should be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of that Act; but that was not at all relied upon in that case; it is difficult for me to see how it well could have been. That which it means is that, though the mode of procedure shall be assimilated to that of an action, the remedy by way of petition of right is not extended. I mention this only because the learned Master in Chambers stumbled upon it.

This provision was not contained in the original provincial Act of the same character—the Petition of Right and Crown Procedure Act, 1872—but was in effect added to it by an amendment to that Act contained in sec. 6 of the Statute Amendment Act, 1887, 50 Vict. ch. 7. It was probably unnecessary, and added only to remove any cause for doubt.

The English enactment was in substance brought into the statutes of this Province in the year 1872: 35 Vict. ch. 13 (O.): and thence was carried into the Revised Statutes of the Province, 1877, ch. 59: but was repealed in the revision of 1887, because its provisions had meanwhile been carried into and become part of the Rules of Court.

The Rules of Court were consolidated by a commission of Judges, and others, appointed under legislative authority: and, as so consolidated, came into force on the 1st day of September, 1897; and by legislation they were given the validity of an Act of the Legislature: see the Judicature Act, R.S.O. 1897, ch. 51, sec. 129.

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The provincial enactment and the amendment of it, before referred to, thus became Rules 922 to 936, inclusive, of the Consolidated Rules, and thus had the validity of legislative enactment given to them.

These Rules and the amendments of them were again consolidated and were curtailed in the year 1913, and as so curtailed and consolidated came into force on the 1st day of September of that year; and, as with the other Rules, have been given the validity of legislative enactment.

In these Rules, Rules 922 to 936 of the former consolidation are reproduced as Rules 738 to 750, inclusive; but, in the curtailment of words, some unintentional change of rights may have been effected.

Rule 929 of the consolidation of 1897, and the rules and statute from which it was taken, set out in detail a number of proceedings in an ordinary action which it made applicable to a petition of right, to which was added a general clause making the Rules, Orders, practice, and course of procedure in actions applicable to petitions of right unless the Court or a Judge otherwise ordered.

In the curtailed consolidation, for brevity's sake no doubt, the earlier part of Rule 929 was omitted, and the whole Rule was embodied in these words: "744. When no other provision is made and so far as the same are applicable, these Rules shall apply to petitions of right. C.R. 929."

In the English enactment, in the provincial enactment, and in all the Rules down to those of 1913, there was the enumeration of certain proceedings in an action, but the very important one of discovery was not included, and that fact had, no doubt, much weight in the easy conclusion of the Court of Queen's Bench in England that an order for production of documents could not be made against the Crown.

If it were not for the change in the Rules made in 1913, and for some other legislation and some circumstances to which I shall refer presently, I should have had no doubt that the ruling of the Court in England should be the ruling in this case, because, apart from it, that should have been my conclusion: having regard to the character of the documents in the possession of the Crown; how accessible they are to the public and how they may be proved: see Taylor on Evidence, part 3, ch. 4, and the Evidence Act of this Province; and especially to the conspicuous absence of discovery from the enumerated proceedings in the Acts and Rules—it should be difficult to reach any other conclusion. But, if that were not so, I should have

given effect, here, to the ruling in England. Whether bound to do so or not, when we borrow enactments from England we ought to accept the interpretation put upon them there, especially by such a Court as that which settled the practice there, by its ruling in *Thomas's case*, *supra*: see also *Tomline v. The Queen*, 4 Ex. D. 252.

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But, in view of the change so made in the Rules, supported by the enactment contained in sec. 2 of the Judicature Act now in force (R.S.O. 1914, ch. 56) that the word "action" means a civil proceeding begun in such manner as may be prescribed by the Rules, as well as begun by writ: I am of opinion that the general Rules respecting production of documents are, subject to the control of the Court, applicable to each of the parties to an "action" such as this.

The circumstances to which I referred are these: the observation of the Lord Chief Justice in *Thomas's case*, which I have already repeated, is no longer applicable: there is now no special provision as to discovery by corporate bodies; all parties come under the general rule: see Rules 349 and 350: and the notion, which once prevailed, that it was necessary, in order to obtain discovery, that a person should be made a party to the action, has long since been brushed away: see *United States of America v. Wagner* (1867), L.R. 2 Ch. 582; and *Republic of Liberia v. Roye* (1876), 1 App. Cas. 139.

Having regard to the character of the documents, and to that which I have already said regarding them, and to the character of the action, it is obvious that the discovery which the suppliant should have should be of a limited character: the most should be an affidavit by some one, as capable as any one else to make it, disclosing all the documents in the possession of the Crown in the usual manner: no order for production of them should go so long as the usual right of inspection of public documents to which I have referred is open to the suppliant; and in all cases the inspection, if any, should be where the documents are.

That which the suppliant gets under the order appealed against is less than that.

Therefore the appeal should be dismissed: the costs of it shall be costs in the action.

[See *Crombie v. The King* (1922), 21 O.W.N. 486, 22 O.W.N. 370, 500.]



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[IN CHAMBERS.]

Dec. 27.

SALTER V. MAHER.

1922.

Jan. 25.

Discovery—Physical Examination of Plaintiffs in Action for Damages for Personal Injuries—Scope of—Judicature Act, sec. 70—Duty of Examining Physician—Stage of Action at which Examination may be Ordered—Report of Physician—Filing—Production—Privilege.

The legislation now found in sec. 70 of the Judicature Act was not intended to do more than give to a party the right, for purposes of discovery only, to the physical examination of the opposite party. The physical examination must, like all examinations for discovery, be confined to the facts in issue, and until the issues are defined a physical examination cannot properly be made.

The examination is strictly confined to a mere examination of the person of the party examined, and the physician making it is not entitled to ask questions.

An application, made immediately after appearance and before the delivery of pleadings, for an order for the physical examination of the plaintiffs, in an action for damages for injuries caused to them by the negligent driving of an automobile by one of the defendants, was refused where the only reasons given for desiring to have the examination at so early a stage were that the examination should be made as soon as possible after the injury and that the information to be obtained by it might result in a settlement.

Clouse v. Coleman (1895), 16 P.R. 496, 541, and *Fraser v. London Street Railway Co.* (1899), 18 P.R. 370, followed.

When an order is made for a physical examination, the examining physician is not required to make any report nor to make or keep any record of it. A provision in an order that the report should be filed in Court was struck out.

Clouse v. Coleman, 16 P.R. at p. 542, followed.

And the order should not provide that the report of the physician, if he make one, shall be privileged from production.

AN appeal by the defendants from an order of the Master in Chambers dismissing their application, made under sec. 70 of the Ontario Judicature Act, for an order for the physical examination of the plaintiffs by a physician and surgeon on behalf of the defendants.

The provisions of sec. 70 are as follows:—

(1) In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily injury sustained by any person, the court which, or the judge, or the person who by consent of parties, or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury damages or compensation are sought shall submit himself to a physical examination by a duly qualified medical practitioner who is not a witness on either side and may make such order respecting the examination and the costs of it as may be deemed proper.

(2) The medical practitioner shall be selected by the court,

judge, or person making the order, and may afterwards be a witness on the trial unless the court, judge, or person before whom the action or proceeding is tried otherwise directs.

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December 16, 1921. The appeal was heard by ORDE, J., in Chambers.

W. Heighington, for the defendants.

W. S. Walton, for the plaintiffs.

December 27. ORDE, J.:—The application was opposed by the plaintiffs on the ground that it was premature and ought not to be made until the defendants would, under the practice, be entitled to discovery. No pleadings have yet been delivered. The writ was issued on the 22nd November, 1921, the claim being for damages for injuries to the plaintiffs caused by the negligent driving of an automobile by one of the defendants while in the employment of the other defendant. The defendants appeared on the 26th November, and immediately afterwards launched their motion before the Master in Chambers. The defendants give as their grounds for desiring a physical examination before delivery of the statement of defence, that the examination should be made as soon as possible after the accident and that the information to be obtained thereby may result in a settlement.

There is nothing in sec. 70 itself to indicate that the principles governing the right to examine for discovery are to be applied to an application for a physical examination. But the history of the section and the decisions under it make it clear that the physical examination permitted by the section is, in the words of Osler, J.A., in *Fraser v. London Street Railway Co.* (1899), 18 P.R. 370, at p. 372, "an examination for discovery only." See also *Burns v. Toronto Railway Co.* (1907), 13 O.L.R. 404. I do not think the legislation was intended to do more than give to a party the right, for purposes of discovery only, to the physical examination of the opposite party, which, prior to the passing of 54 Vict. ch. 11, it had been decided in *Reilly v. City of London* (1891), 14 P.R. 171, he could not have under the law as it then stood.

It does not follow from this, of course, that in exceptional cases a physical examination may not be ordered before the statement of defence is delivered or the pleadings are closed, and it may be that, because of the peculiar nature of the discovery permitted by sec. 70 and of the absence of any limitation in the section as to the stage of the action at which the applica-

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tion may be made, the Court would order a physical examination at an earlier stage in cases where it might not order an examination for discovery. But, in the absence of some evidence to shew the necessity of a physical examination at this stage rather than at a later stage, I cannot believe that either the mere suggestion that it is important to have the examination as soon as possible after the accident, or that the information to be gained thereby may expedite a settlement, is sufficient ground for departing from the rules as to discovery, which I think ought to govern the Court in dealing with applications under sec. 70.

It must be apparent, when it is remembered that the physical examination by a physician under sec. 70 is strictly confined to a mere examination of the person of the party examined and that the physician is not entitled to ask questions or to conduct any oral examination (*Clouse v. Coleman* (1895), 16 P.R. 496, 541), that the examining physician would be greatly handicapped in making an examination before the issues in the action are clearly defined by the pleadings, and in most cases until the ordinary examination for discovery has taken place. Without the information so afforded how is he to proceed? Is a female plaintiff, whose sole injury, for example, is a broken arm, to be subjected to the indignity of a complete physical examination merely because the action has not yet reached the stage at which she is required by the practice to disclose the exact nature of her injuries? The physical examination must, like all examinations for discovery, be confined to the facts in issue, and until the issues are defined I do not see how, except in very rare cases, a physical examination can be properly made.

For these reasons, the defendants' appeal fails and must be dismissed, with costs payable to the plaintiffs in any event of the cause.

At a later stage of the action, the Master in Chambers made an order for the physical examination of the plaintiffs, and the defendants appealed from the order.

January 24. The appeal was heard by RIDDELL, J., in Chambers.

Heighington, for the defendants.

Walton, for the plaintiffs.

January 25. RIDDELL, J.:—In an action for damages occasioned by negligent driving, the defendants applied for an order, under sec. 70 of the Judicature Act, for the physical

examination of the plaintiffs by Dr. G.; the order was made, but the Master in Chambers directed that "the report of such examination by Dr. G. shall be delivered to and filed at the office of the Master in Chambers, Osgoode Hall, . . ." The defendants appeal from this provision.

I asked the plaintiffs' counsel by what authority a report was required at all under the statute; and he could find none.

The cases cited at the hearing do not seem to me to have any bearing upon the matter: *Friend v. London Chatham and Dover Railway Co.* (1877), 2 Ex. D. 437, and cases cited; *Pacey v. London Tramways* (1876), *ib.* 440 (note); Chitty and Marks, Yearly Practice, 1922, p. 443, and cases there mentioned.

The whole purpose and intent of the provisions of sec. 70 are stated with clearness and accuracy by Osler, J.A., in *Clouse v. Coleman*, 16 P.R. 541, at p. 542: "The medical practitioner . . . is not required to report the result of the examination to the Court. The examination is not one taken on oath or in writing, nor does it seem to have been intended that any record should be made or kept of it." This agrees with my own opinion, stated at the hearing; and I so decide.

The appeal will be allowed; costs to the defendants in any event.

On settling the minutes of the order of RIDDELL, J., a clause was inserted providing that the report of the doctor was to be privileged from production.

The minutes were spoken to before RIDDELL, J., who struck out this clause, saying that he decided nothing concerning the doctor's report if he should make one.

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Jan. 27.

SHEPPARD v. SHEPPARD.

Husband and Wife—Action by Wife against Parents of Husband for Inducing him to Abandon her—Whether Maintainable—Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 4 (2)—“Either in Contract or in Tort or otherwise.”

An action may be maintained by a married woman against the parents of her husband for having slandered her to their son and caused an estrangement and induced him to abandon her and to take proceedings to obtain a divorce.

Such an action is not analogous to an action for criminal conversation.

Lellis v. Lambert (1897), 24 A.R. 653, distinguished.

Section 2 (2) of the first Ontario Married Women's Property Act, 1884, 47 Vict. ch. 19, provided that a married woman should “be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort or otherwise in all respects as if she were a *feme sole*.” The words “either in contract or in tort or otherwise” were omitted in the revisions of 1887 and 1897, but re-appeared in 3 & 4 Geo. V. ch. 29, sec. 4 (2), and are now found in R.S.O. 1914, ch. 149, sec. 4 (2).

MOTION by the defendants to set aside the delivery of the statement of claim in this action, upon the grounds stated below.

January 19. The motion was heard by LATCHFORD, J., in the Weekly Court, Toronto.

H. S. White, K.C., for the defendants.

J. M. McEvoy, K.C., for the plaintiff.

January 27. LATCHFORD, J.:—Motion by the defendants to set aside the delivery of the statement of claim, in an action by a married woman against the parents of her husband for having slandered her to their son and caused an estrangement between him and the plaintiff, and for inducing him to abandon the plaintiff and proceed from this Province to Michigan and there enter suit for a divorce against her.

It is objected and admitted that the pleading was not delivered within the time prescribed by the Rules. For this lapse a remedy should of course be prescribed.

Another objection is that the action does not lie in view of the decision of the Court of Appeal in *Lellis v. Lambert* (1897), 24 A.R. 653, overruling the judgment of the Queen's Bench Division in *Quick v. Church* (1893), 23 O.R. 262.

In *Lellis v. Lambert* a married woman sought to recover damages from another woman who was alleged to have alienated

the affections of the plaintiff's husband and to have committed adultery with him. The Court held, reversing the judgment of the Divisional Court and of the trial Judge, that such action was not maintainable. This decision was followed in the parallel cases of *Lawry v. Tuckett-Lawry* (1901), 2 O.L.R. 162, and *Weston v. Perry* (1909), 1 O.W.N. 155.

The Married Women's Property Act in force when the action of *Lellis v. Lambert* was tried in 1895, R.S.O. 1887, ch. 132, provided (by sec. 3 (2)) that a married woman should "be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a *feme sole*."

The revision of 1887 omitted the words "either in contract or in tort or otherwise," appearing after the word "sued" in the Married Women's Property Act of 1884, 47 Vict. ch. 19, sec. 2 (2), and in sec. 1, subsec. 2, of the English Married Women's Property Act, 1882, 45 & 46 Vict. ch. 75. The words "in all respects" were not used *instead of* the omitted words, as is erroneously stated in the judgment of one of their Lordships in *Lellis v. Lambert*. They appeared in the original and in all the revisions. In the revision of 1897, ch. 163, sec. 3 (2), the omission was again made of the words "either in contract or in tort or otherwise." However, in 1913, in 3 & 4 Geo. V. ch. 29, sec. 4, subsec. 2, and in the Revised Statutes of 1914, ch. 149, sec. 4, subsec. 2, the words "either in contract or in tort or otherwise" reappear.

Mr. Justice Osler in *Lellis v. Lambert* thought that the sense of the paragraph was unaffected by the omission or retention of these words.

The decision of the Court of Appeal is binding on me, and I should be obliged to follow it if this case was not clearly distinguishable. This is not an action analogous to the criminal conversation action which a husband may bring, while a wife cannot maintain a similar action.

The present suit is of an entirely different character, and I see no reason whatever for determining that the plaintiff is not entitled to maintain it.

The statement of claim needs revision, and leave is granted to the plaintiff to make whatever amendments may be thought necessary. The time for filing is extended to the 8th February.

Costs of and incidental to this application will be costs in the cause.

[An appeal by the defendants from the order of LATCHFORD, J., was quashed by the First Divisional Court of the Appellate Division on the 27th March, 1922. See 22 O.W.N. 97.]

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[APPELLATE DIVISION.]

Jan. 30.

†
REX V. HEWITT.

Criminal Law—Distributing Information Intended to Assist in Betting upon Horse-races—Criminal Code, sec. 235 (f) (9 & 10 Edw. VII. ch. 10, sec. 3)—Evidence—Intention—Mens Rea.

Section 235 of the Criminal Code, as enacted by (1910) 9 & 10 Edw. VII. ch. 10, sec. 3, provides that every one is guilty of an indictable offence who (f) “advertises, prints, publishes . . . sells or supplies, or offers to sell or supply, any information intended to assist in, or intended for use in connection with, book-making, pool-selling, betting or wagering upon any horse-race or other race,” etc.:—

Held, that the essence of the offence which the statute creates is the dissemination of information *intended* to assist in or for use in connection with book-making, etc.

The information must be *intended* for the purpose mentioned in the statute. And where, upon a prosecution for an offence against the statute, it was proved that the accused distributed a paper called “Daily Racing Form,” containing information which might and perhaps would be of use in betting, it was *held*, that the intention that it should be used in connection with betting was not established, there being no evidence of such intention.

Rex v. Luttrell (1911), 2 O.W.N. 729, 18 O.W.R. 659, 18 Can. Crim. Cas. 295, considered.

Sherras v. De Rutzen, [1895] 1 Q.B. 918, and *Bank of New South Wales v. Piper*, [1897] A.C. 383, followed.

CASE stated by J. Herbert Denton, Esquire, one of the Junior Judges of the County Court of the County of York and one of the Police Magistrates for the City of Toronto, as follows:—

“William Hewitt was tried before me, as Police Magistrate in and for the City of Toronto, on an information and complaint that the accused ‘on the 14th day of September, 1921, did, contrary to law, advertise, publish, exhibit, sell, or supply, or offer to sell or supply, information intended to assist in or intended for use in connection with book-making, pool-selling, betting or wagering upon horse-races.’”

“The evidence for the Crown was that on the 14th day of September, 1921, the accused distributed in Toronto the paper called ‘Daily Racing Form’ (Canadian edition). The accused admitted that he brought this paper into Toronto, and that he was the sole distributor in Toronto. The rest of the evidence for the Crown consisted of the opinion of a witness who might be called an expert, and his explanation of certain words, phrases, and figures appearing throughout the paper.

“The evidence for the defence consisted of the opinion of a witness who might be called an expert, and his explanation of certain words, phrases, and figures appearing throughout the

paper, together with a statement by the proprietor of the paper as to the purposes of the paper, and a statement by an officer of the National Live Stock Records at Ottawa as to the uses made of the half-yearly edition of the paper.

"On the 27th day of October, 1921, I gave judgment convicting the defendant of an offence as charged, and fined the defendant \$25 and costs.

"At the request of counsel for the prisoner I granted this stated case.

"The information, the evidence taken at the trial, and the exhibits and my reasons for judgment, are forwarded herewith and made part of this case. I reserve the following question for the opinion of the Court:—

"Was there evidence on which I could properly convict the said William Hewitt of the offence charged?

December 19, 1921. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and SUTHERLAND, J.

I. F. Hellmuth, K.C., for the defendant, argued that the accused must be shewn not only to have sold a paper containing illegal information, but also to have intended that this information should assist in or be used in betting, before a conviction could properly be made: *Rex v. Luttrell* (1911), 2 O.W.N. 729, 18 O.W.R. 659, 18 Can. Crim. Cas. 295; *Bank of New South Wales v. Piper*, [1897] A.C. 383. This had not been shewn here. It had not even been shewn that the accused had sold information which from its character he must have known could only be intended to assist in betting. No doubt the "Daily Racing Form," or parts of it, could be so used, but that was not the only use to which it could be put. In fact it was used by breeders, owners, race-track officials, and others, for many other purposes. In these circumstances the conviction should be quashed.

Edward Bayly, K.C., and *J. C. McRuer*, for the Crown, contended that the possession of the illegal intent by the seller could be reasonably inferred from the nature of the literature itself: *Rex v. Roher* (1916), 10 O.W.N. 303, 26 Can. Crim. Cas. 376; *Rex v. Farrington* (1811), Russ. & R. 207. Counsel pointed to page after page of the "Daily Racing Form" which he contended contained information useful only to bettors, and argued that the conviction had been properly made.

Hellmuth, in reply.

January 30, 1922. HODGINS, J.A. (after setting out the stat-

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ed case as above):—Section 235 (f) of the Criminal Code (as enacted by 9 & 10 Edw. VII. ch. 10, sec. 3) deals with any information “*intended to assist in, or intended for use in connection with, book-making, pool-selling, betting or wagering upon any horse-race or other race,*” etc., and the offence may be either advertising, printing, publishing, exhibiting, posting up, selling, supplying, or offering to sell or supply, that information.

It was argued for the accused that criminal intent in the person charged must be shewn, and *Rex v. Luttrell*, 2 O.W.N. 729, 18 Can. Crim. Cas. 295, 18 O.W.R. 659, where a newsboy had been convicted, was relied on.

That case is not decisive either way. Meredith, J.A., does say that the intention “must be that of the accused,” but he sums up in this way: “There was no reasonable evidence of the criminal intention, which the enactment is aimed against, in either publisher or seller.” Magee, J.A., says: “Whether intention of the publisher alone is sufficient and whether if so scienter must be proved against the seller, are questions upon which there may be much to be said.”

The conviction was, in fact, for something which was not a crime, so both Judges say, and therefore the conviction was quashed. But there is no means of ascertaining whether the concurrence of the other three Judges was given for that reason only, or whether they agreed with the dictum I have quoted from the judgment of Meredith, J.A.

The question, therefore, still remains, is the intention that of the person who is responsible for the characteristics and contents of the information itself, to be gathered from those elements, or proved by direct testimony; or must there be an intention, in the person accused, to sell or distribute information which from its character he knew or must be taken to have known could only be intended to assist in betting or to be used therein?

In other words, is the offence the sale of contraband information with or without knowledge of its contents, or the sale of information intended by the seller to assist in or to be used in betting?

The exception in subsec. 2 of sec. 235 should be noticed. Under it no offence is committed by “the sale by such association” (one legally entitled to conduct a race-meeting) “of information . . . to assist in or enable the conducting of book-making, pool-selling, betting or wagering,” etc. That is to say, a sale by an association, for the very purpose struck at by the section, of information intended by them to assist in betting, is

not illegal under the circumstances named. What is legalised thereby is a sale with a present intention in the seller to assist in betting.

I think the law on the subject is well stated in two cases, *Sherras v. De Rutzen*, [1895] 1 Q.B. 918, and *Bank of New South Wales v. Piper*, [1897] A.C. 383.

In the first case, Wright, J., said (p. 921): "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

In the second case, Sir Richard Couch said ([1897] A.C. at pp. 359, 390): "The questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

The evil to be guarded against is identical with that excepted by the subsection for a limited time and in a particular case. In my opinion, if the advertiser, printer, exhibitor, seller, etc., possesses the intent that the information he makes public or distributes shall be used to assist or to be used in betting, and if the information be of such a nature as to be useful to promote betting, or if the literature is in itself such that it is only capable of being an assistance to, or useful in, betting, so that the possession of such an intent in selling it may be naturally and reasonably inferred in the person accused, I think an offence within the statute has been established.

This appears to have been the opinion of the late Chief Justice of the King's Bench in *Rex v. Roher*, 10 O.W.N. 303, 26 Can. Crim. Cas. 376, and is quite in accord with the opinion of Meredith, J.A., already quoted, and with such cases as *Rex v. Farrington*, Russ. & R. 207, and *Rex v. Karn* (1903), 5 O.L.R. 704, 6 Can. Crim. Cas. 479.

In the latter case the words of the Code (sec. 179 (c), now 207 (c)) were, "offers to sell . . . or has for sale . . .

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any . . . drug . . . intended or represented as a means of . . . causing abortion." Osler, J.A., said (5 O.L.R. at p. 706): "If that meaning could not be drawn from the circular, the notice, and the printed directions, the case for the prosecution necessarily failed, as there was no extraneous evidence to give point to the language of the printed papers, and to shew that the medicine had *been sold for the purpose said to be intended or represented.*" The full Court held that, if the trial Judge had concluded that the circular, etc., were incapable of the meaning set out in the statute, he might have withdrawn the case from the jury; but, if he held them capable, it was then for the jury to decide whether or not they had such meaning, having regard to the context and the circumstances of the case.

There remains to be decided the question whether there is any evidence, having regard to the foregoing, to warrant the conviction. If the section is to be properly construed as prohibiting the sale and distribution of literature which could profitably be used in betting, apart from intention that it should be so used, then there is sufficient evidence that parts of "Daily Racing Form" are really only useful in that direction. But, if the offence must include intent in the accused or *mens rea*, either directly proved or to be inferred from facts from which only one conclusion can be drawn, as I think it does, there is nothing to support a finding of guilt. This publication has run, practically in its present form, since 1893. It is used by and is useful to breeders, owners, race-track officials, the Canadian National Live Stock Records Association, as well as book-makers and bettors. Its proprietor says: "I have no disposition to deny that the 'Daily Racing Form' can be used for betting, but that is not its purpose." The learned Police Magistrate says in his judgment: "I do not think that the accused knowingly intended to break the law."

In the face of this uncontradicted evidence and this finding, it is impossible for this Court, if intent or *mens rea* is an essential element, to find that it existed either in the accused or in those who sold him the paper for distribution.

It would be very easy to put such information as is objected to here in the category of forbidden publications, as was done so completely during the war in respect to those papers which tended to sap the morals of the people or weaken their belief in their cause and its ultimate success: see the War Measures Act, 1914, 5 Geo. V. ch. 2, sec. 6 (Dom.), and the language of the orders in council which were enacted under it. But this

step has not been taken, and it is one for Parliament and not for the Court to take.

I think the question reserved must be answered in the negative and the conviction quashed.

I may add that it would be most convenient if the Judge who reserves a case to this Court would, in all cases, set out exactly the terms of the conviction.

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MEREDITH, C.J.O.:—I have had the opportunity of reading the opinion of my brother Hodgins and agree in the conclusion to which he has come, that the question asked in the stated case should be answered in the negative.

To read the statutory provision under which the conviction took place as it must have been read by the learned Police Magistrate is to substitute for the word "intended" the word "calculated" or some such word.

The essence of the offence which the statute creates is the dissemination of information intended to assist in or for use in connection with book-making, etc. The information must be intended for the purpose mentioned in the statute.

It is unnecessary to decide whether it is the intention of the publisher or of the person who distributes that is to be proved, for there was no evidence of the forbidden intention by either of them. The most that can be said is that the information might and perhaps would be of use in betting, but that is far from establishing that it was intended to be used in connection with betting.

MACLAREN and MAGEE, JJ.A., and SUTHERLAND, J., agreed with MEREDITH, C.J.O.

Question answered in the negative and conviction quashed.

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[APPELLATE DIVISION.]

Jan. 30.

REX V. WINDSOR JOCKEY CLUB LIMITED.

Criminal Law—Keeping Common Betting House—Race-Course—Betting on Races—Incorporated Association—Powers—Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 17—R.S.O. 1914, ch. 178, sec. 210 (6 Geo. V. ch. 35, sec. 6)—“Driving Park Purposes”—“Driving Competitions”—Running Races—Criminal Code, sec. 228, 235 (2)—Exception of Race-track of Incorporated Association—Limitation of Word “Association.”

The defendant club was charged before a police magistrate with the offence of keeping a common betting house on its premises, upon a day in 1921, contrary to sec. 228 of the Criminal Code, and was acquitted upon the ground that the case came within the provisions of subsec. 2 of sec. 235 of the Code. It was established in evidence that betting upon horse-races took place on the race-track of the club upon the day named, and also that before the 12th March, 1912, racing was being carried on upon the track of the club in the same way. The club or association was originally incorporated under a different name, in 1884, by letters patent issued under the Ontario Companies Act, with powers, *inter alia*, to acquire grounds for “driving park purposes,” driving competitions,” etc. In 1912, an order in council was passed changing the name of the association to the above name; and in 1913 supplementary letters patent were issued increasing the capital stock and extending the powers of the club to include “racing competitions:”—

Held, that the word “driving” in the charter could not properly be restricted to trotting and pacing races, but included running races.

2. But, if that were not so, the defendant corporation had, by reason of the supplementary and incidental powers conferred upon it by sec. 17 of the Ontario Companies Act, 7 Edw. VII. ch. 34, capacity and power to carry on racing competitions between running horses as distinguished from trotting and pacing horses.

3. That, both by reason of the fact that the defendant corporation’s charter was issued under the Great Seal of the Province and that it was a corporation to which sec. 210 of the Companies Act, R.S.O. 1914, ch. 178, as enacted by (1916) 6 Geo. V. ch. 35, sec. 6, applied, it was an association incorporated before the 20th March, 1912, with the capacity and powers of a common law corporation, and as such had capacity and power to carry on a running race-meet.

Edwards v. Blackmore (1918), 42 O.L.R. 105, and *Jenkin v. Pharmaceutical Society of Great Britain* (1920), 37 Times L.R. 54, referred to.

Held, therefore, that the corporation was entitled to the protection of subsec. 2 of sec. 235, and so exempt from the operation of sec. 223 of the Code.

Per MEREDITH, C.J.O.:—If the words of subsec. 2 of sec. 235 ought to be read with some qualification, the farthest limitation which should be imposed would be that the association should be one empowered to possess race-tracks and to hold race-meetings—and the defendant corporation was such an association.

CASE reserved and stated by W. E. Gundy, Police Magistrate for the City of Windsor, pursuant to sec. 1014 of the Criminal Code, as follows:—

"The defendant, with the consent of its attorney, was tried summarily before me, in the city of Windsor, in the county of Essex, on the 25th day of August, 1921, on the following charge:—

"That on the 14th day of July, 1921, it did keep a disorderly house, that is to say, a common betting house, at the premises known as the Windsor Jockey Club Limited, contrary to sec. 228 of the Criminal Code.'

"It was established in evidence that betting on the 'pari-mutuel system' took place on the race-track of the defendant upon the day named in the charge; that there were about 12,000 people present, a large proportion of whom were engaged in betting on the races then being conducted upon the said race-track, and I acquitted the defendant because, in my opinion, it came within the provisions of subsec. 2 of sec. 235 of the Criminal Code,* and the prohibition against keeping such common betting house contained in sec. 228 of the Criminal Code did not apply to it.

"It also appeared from the evidence that prior to the 20th March, 1912, racing was being carried on upon the track of the association in the same way as at present, except that the 'pari-mutuel system' of betting had not been installed, and the betting was conducted by book-making.

"The Windsor Jockey Club was originally incorporated by letters patent of the Province of Ontario, dated the 3rd May, 1884, under the name of the Windsor Fair Grounds and Driving Park Association, with powers to acquire grounds for agricultural fair and driving park purposes, for the erection of all necessary buildings and stands thereon for that purpose, the fencing in of the said grounds for the holding of agricultural fairs, cattle exhibitions, driving competitions, etc.

"On the 18th December, 1912, an order in council was passed changing the name of the Windsor Fair Grounds and Driving Park Association to the Windsor Jockey Club Limited.

"On the 6th January, 1913, supplementary letters patent were issued increasing the capital stock of the Windsor Jockey

*Subsection 2 of sec. 235 (as enacted in 1912 by 2 Geo. V. ch. 19) provides as follows:—

"2. The provisions of this section and of sections 227 and 228 shall not extend to . . . bets made upon the race-course of any association incorporated in any manner before the 20th day of March, 1912, or incorporated after that date by special Act of Parliament of Canada or of the Legislature of any Province of Canada, during the actual progress of a race-meeting conducted by such association upon races being run thereon. . . ."

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Club Limited from the sum of \$50,000 to the sum of \$200,000, and extending its powers to include racing competitions.

"The question reserved for the Court is:—

"Whether the Windsor Jockey Club Limited is entitled to the protection of subsec. 2 of sec. 235 of the Criminal Code and so exempt from the operation of sec. 228 of the Criminal Code."

December 20, 1921. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Edward Bayly, K.C., for the Crown, contended that the defendant club was not entitled to the protection of subsec. 2 of sec. 235 of the Criminal Code. If the words of the subsection were interpreted literally, absurdity would result, because, for example, bets upon the race-track of a cemetery corporation, if such company wished to operate a track, would be protected. He urged that the defendant club had no power to hold running races. The words "driving park purposes" and "driving competitions" did not cover race-meetings. These words limited the horse-racing operations of the club to trotting and pacing competitions. He referred to *Edwards v. Blackmore* (1918), 42 O.L.R. 105, 42 D.L.R. 280.

E. S. Wigle, K.C., for the defendant club, argued that it was entitled to the protection of subsec. 2 of sec. 235, and was therefore exempt from the operation of sec. 228. The word "driving" in the club's charter would include running as well as trotting and pacing races. If the original charter did not give the required powers, then sec. 17 of the Ontario Companies Act, 7 Edw. VII. ch. 34, gave these powers. Counsel also contended that the defendant club came under the provisions of sec. 6 of ch. 35 of the Ontario statutes of 1916, and so would have the powers claimed. He referred to *Jenkin v. Pharmaceutical Society of Great Britain* (1920), 37 Times L.R. 54, and *Williams v. Evans* (1876), 1 Ex. D. 277.

Bayly, in reply.

January 30, 1922. FERGUSON, J.A. (after setting out the stated case as above):—The result turns on whether or not the club ever had the power to carry on "running" races. Counsel for the Crown contends that the words "driving park purposes" and "driving competitions" do not cover race-meetings, and consequently do not authorise the corporation to own and conduct a park where running races are carried on; that running race-meetings are not driving competitions within the meaning of the charter. He argues that the words of the char-

ter restrict the operations of the corporation in respect of horse-racing to trotting and pacing races and to a park used for such purposes.

I am of the opinion:—

1. That the word “driving” cannot be properly restricted to trotting and pacing races, but includes driving by the rider in a running race.

2. That, even if I be wrong, and the word “driving” should be construed to include only trotting and pacing competitions, yet that on the 20th March, 1912, the defendant corporation had, by reason of the supplementary and incidental powers conferred upon it by sec. 17 of the Ontario Companies Act, 7 Edw. VII. ch. 34, capacity and power to carry on racing competitions between running horses as distinguished from trotting and pacing horses. That section in part reads:—

“17. A company having share capital shall possess the following powers as incidental and ancillary to the powers set out in the letters patent or supplementary letters patent:—

“(a) To carry on any other business (whether manufacturing or otherwise) which may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company’s property or rights; . . .

“(i) To purchase, take on lease or in exchange, hire or otherwise acquire, any personal property and any rights or privileges which the company may think necessary or convenient for the purposes of its business . . . ”

3. That, both by reason of the fact that the company’s charter was issued under the Great Seal of the Province, and that it is a company to which sec. 210* of the Companies Act, R.S.O. 1914, ch. 178, as enacted by sec. 6 of 6 Geo. V. ch. 35 (1916), applies, it was an association incorporated before the 20th day of March, 1912, with the capacity and powers of a common law corporation, and as such had capacity and power to carry on a running race-meet. See *Edwards v. Blackmore*, 42 O.L.R. 105, 42 D.L.R. 280, and cases there collected; also *Jenkin v. Pharmaceutical Society of Great Britain*, 37 Times L.R. 54.

*210. “Every corporation or company heretofore or hereafter created . . . (e) by or under any general or special Act of this Legislature, shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter.

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I would, for these reasons, answer the question in the affirmative.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed with FERGUSON, J.A.

MEREDITH, C.J.O.:—I agree with the conclusion to which my brother Ferguson has come.

If the words of the statute are to be read literally, the bets made upon the respondent's race-track come within the exception mentioned in subsec. 2 of sec. 235 of the Criminal Code, for they were bets made at a race-meeting upon the race-track of an association incorporated before the 20th day of March, 1912.

It was argued that the words of the statute must be read with some qualification, for otherwise it would bring within the exception bets made upon a race-track of an association incorporated for purposes altogether foreign to horse-racing, and the case of a cemetery company was suggested for the purpose of shewing the absurdity to which the literal interpretation would lead.

It may be that the words of the statute ought to be read with some qualification; but, if so, the farthest limitation which, in my judgment, should be imposed would be that the association is one endowed with power to possess race-tracks and to hold race-meetings—and that the respondent association was. I see no reason why those powers were not possessed by it, though they had not been exercised before the day mentioned in the section, as ancillary powers under the Companies Act quoted by my brother Ferguson, or powers inherent in the association as a common law corporation.

I see no reason why a manufacturing corporation, incorporated before the 20th March, 1912, may not own a race-track and hold race-meetings for the amusement of its employees and their friends, and why should bets made upon such a race-track not be held to come within the exception mentioned in the section?

I agree with my brother Ferguson that the word "driving" used in the charter does not restrict the respondent's right to "trotting and pacing races," and that running races are included.

Question answered in the affirmative.

A

[APPELLATE DIVISION.]

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Jan. 30.

REX v. WESTERN RACING ASSOCIATION LIMITED.

Criminal Law—Keeping Common Betting House—Race-course—Incorporated Association—Powers—Criminal Code, secs. 228, 235 (2)—Exemption—Establishment of Race-course in Locality other than that Designated in Original Charter—Supplementary Letters Patent—Effect of—Continued Existence of Association as Corporate Entity.

A race-course acquired and operated by an incorporated racing association in a locality other than that designated in the original charter of the corporation, comes within the exemption of sec. 235 (2) of the Criminal Code (as enacted by the amending Act of 1912, 2 Geo. V. ch. 19), where the power to acquire and operate the race-course was granted by supplementary letters patent issued after the 20th March, 1912.

Hepburn v. Connaught Park Jockey Club of Ottawa (1916), 10 O.W.N. 333, approved.

The supplementary letters patent, which purported to cancel the powers expressly conferred by the charter and substitute others therefor, did not take the corporation out of the class of corporations whose race-courses are exempted by sec. 235 (2) of the Code—the corporation never ceased to exist as an entity.

The corporation, coming within the provisions of sec. 235 (2), was exempt from the operation of sec. 228; and was properly acquitted upon a charge of keeping a common betting house, contrary to that section.

CASE reserved and stated by W. E. Gundy, Police Magistrate for the City of Windsor, pursuant to sec. 1014 of the Criminal Code, as follows:—

“The defendant, with the consent of its attorney, was tried summarily before me, in the city of Windsor, in the county of Essex, on the 25th day of August, 1921, on the following charge:—

“That on the 2nd day of August, 1921, it did keep a disorderly house, that is to say, a common betting house, at the premises known as the Devonshire Park Race-track, contrary to sec. 228 of the Criminal Code.’

“It was established in evidence and admitted by the defendant that betting on the ‘pari-mutuel system’ on a large scale took place on the race-track of the defendant at Devonshire Park upon the day mentioned in the charge; that there were about 10,000 people present, a large proportion of whom were engaged in betting on the races then being conducted upon the said race-track; and I therefore found that the defendant did on that day keep a disorderly house, that is to say, a common betting house, but acquitted the defendant because, in my opinion, it came within the provisions of subsec. 2 of sec. 235 of

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the Criminal Code, and the prohibition against keeping such common betting house contained in sec. 228 of the Criminal Code did not apply to it.

“The defendant was incorporated as the Ottawa Racing Association Limited, by letters patent of the Dominion of Canada bearing date the 27th November, 1903, with powers to acquire real estate in the city of Ottawa, or in the neighbourhood thereof, for the purpose of constructing and maintaining thereon a race-course and steeplechase-course with grand stands, stables, and all the accessories of a modern race-course, and for the establishment of a racing association, jockey club, and hunt club, and for the purpose also of establishing and maintaining one or more social clubs in connection with the said racing association, and generally for the purpose of encouraging and promoting horse-racing and horse-riding and social intercourse among persons interested in such matters.

“On the 19th day of December, 1914, supplementary letters patent were granted changing the name of the company to that of the Western Racing Association Limited, and the powers granted to the said company by the letters patent of incorporation were expressed to be cancelled and the following objects and purposes were expressed to be substituted therefor:—

“(a) To hold race-meetings and races and other contests or trials of skill and endurance of man or beast.

“(b) To establish and maintain racing associations, jockey clubs, and hunt clubs, and to maintain social clubs in connection with the said racing associations, and particularly to conduct under the same auspices and control a series or circuit of race-meetings at or near the cities of Montreal, in the Province of Quebec, Toronto, in the Province of Ontario, and Winnipeg, in the Province of Manitoba, and other cities in the Dominion of Canada.

“(c) To construct and maintain race-courses and steeplechase-courses, with all the accessories of a modern race-course and club-house, and to encourage and promote horse-racing and horse-riding and other races and contests and trials of skill and endurance of man and beast.

“The Devonshire Park was established and put into operation subsequent to the 20th March, 1921.

“The question reserved for this Honourable Court is:—

“Is the defendant within the provisions of subsec. 2 of sec. 235 of the Criminal Code, and so exempt from the operation of sec. 228 of the Criminal Code?”

December 20, 1921. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Edward Bayly, K.C., for the Crown, argued that the defendant association did not come under the provisions of subsec. 2 of sec. 235 of the Criminal Code, and so was not exempt from the operation of sec. 228. The power to operate the track at Windsor was given by supplementary letters patent, which were granted after the 20th March, 1912. This fact took the association out of the exemption contained in sec. 235, as also did the fact that the supplementary letters cancelled the powers expressly conferred by the charter, and substituted others therefor. He referred to *O'Neill v. London Jockey Club* (1915), 8 O.W.N. 602.

R. L. Brackin, K.C., for the defendant association, contended that the plain words of the statute covered the case. The statute permitted what would otherwise be gambling, upon the race-course of any association incorporated before the 20th March, 1912. The race-course in question here belonged to an association incorporated before that date: *Hepburn v. Connaught Park Jockey Club of Ottawa* (1916), 10 O.W.N. 333. He also argued that, even if the supplementary letters cancelled the express powers conferred by the charter, they did not destroy the existence of the association, and so it was entitled to the protection of sec. 235.

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Bayly, in reply.

January 30, 1922. FERGUSON, J.A. (after setting out the stated case as above) :—Section 235 (2) of the Criminal Code (as enacted by the amending Act of 1912, 2 Geo. V. ch. 19, sec. 1) exempts from the operation of sec. 228 “bets made or records of bets made upon the race-course of any association incorporated in any manner before the 20th day of March, 1912.”

The questions for consideration seem to me to be:—

1. Is a race-course acquired and operated in a locality other than the locality designated in the original charter of the corporation within the exemption of sec. 235 (2) if the power to acquire and operate such a track was granted by supplementary letters patent issued after the 20th March, 1912?

2. Did the supplementary letters patent, which purported to cancel the powers expressly conferred by the charter and substitute others therefor, take this corporation out of the class of corporations whose race-courses are exempted by sec. 235 (2) of the Code?

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The first question was passed upon by Mr. Justice Middleton in *Hepburn v. Connaught Park Jockey Club of Ottawa*, 10 O.W.N. 333, as follows:—

“The Ottawa Racing Association Limited, which afterwards became the Western Racing Association Limited, was incorporated, by letters patent issued under the Statutes of Canada, on the 27th November, 1903, and by the letters patent was empowered to acquire real estate at Ottawa for the purpose of constructing and maintaining a race-course and its accessories and the establishing and maintaining a racing association, jockey club, and hunt club in connection therewith. This statement of the objects of incorporation was followed by the words, ‘the operations of the company to be carried on throughout the Dominion of Canada and elsewhere.’ These words in a similar context were considered by me in the case of *O’Neill v. London Jockey Club*, 8 O.W.N. 602, and I adhere to the view there expressed, that they do not confer upon the association the right to establish a race-course elsewhere than at the place named.

“Supplementary letters patent were granted on the 19th December, 1914, changing the name of the association and also substituting much wider powers. Under these substituted powers the company is authorised to hold race-meetings and to construct and maintain race-courses at certain named cities in Canada, ‘and other cities in the Dominion of Canada.’

“The Criminal Code, as now amended, prohibits betting upon race-courses save ‘upon the race-course of any association incorporated in any manner before the 20th day of March, 1912.’

“This association has not yet established any race-course; but the charter has been purchased by the plaintiffs for the purpose of establishing a race-course elsewhere than in the city of Ottawa, the place named in the original letters of incorporation; and the question is, whether this race-course falls within the exception of the Criminal Code. If it does, it is then said by the plaintiffs’ counsel that he has no reason for complaint, and that the action, subject to the other question to be considered, will fall to the ground.

“The words of the statute must be construed as they stand, and I am not at liberty to consider the policy of the legislation, nor what the Legislature would have done if the precise question before me had been present to the mind of the draughtsman of the Act. It may well be that, as contended, the intention of the Legislature was to protect only existing race-courses; but that is not what the statute says. It permits that which would otherwise be gambling, upon the race-course of an as-

sociation incorporated in any manner before the date named. Any race-course which this association establishes under its charter falls within these precise words. It is the race-course of an association incorporated before the passing of the Act. The statute has not said 'on any race-course already established or upon any race-course that may hereafter be established under powers conferred upon any racing association;' but the date of incorporation has been made the sole criterion."

I concur in the opinion of Mr. Justice Middleton and have nothing to add.

That brings me to the second question. I am of the opinion that, even if the supplementary letters patent be construed as cancelling the express powers conferred by the charter, yet the corporation never ceased to exist as an entity, corporation, or association, but has always continued to be an entity, and as such an association that was incorporated before the 20th March, 1912, with power at that date to operate a race-course within the meaning of sec. 235.

For these reasons, I would answer the question submitted in the affirmative.

MACLAREN, MAGEE, and HODGINS, J.J.A., agreed with FERGUSON, J.A.

MEREDITH, C.J.O.:—For the reasons given by my brother Ferguson, and those stated by me in *Rex v. Windsor Jockey Club Limited*, ante, I am of opinion that the question should be answered in the affirmative.

Judgment accordingly.

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[APPELLATE DIVISION.]

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Jan. 30.

Trusts and Trustees—Application for Administration Order—Delay in Sale of Valuable Property—Powers and Discretion of Trustees under Will—Technical Breaches of Trust—Advances Made to Beneficiaries, including Applicant—Status of Applicant to Complain—Application Supported by Official Guardian on Behalf of Beneficiary not sui Juris — Administration Order Granted with Special Direction as to Preservation of Powers and Discretion of Trustees—Practice in Administration Proceedings—Rules 608, 611, 614.

The trustees appointed by a testator had in their hands a large estate, including a property in Virginia of great but somewhat speculative value. The will, among other things, provided that "all the residue of my property, wheresoever situate, shall be sold for cash or on credit, at such times, in such manner, and upon such terms as my said trustees in their discretion shall deem proper or expedient." Two years after the death of the testator, the Virginia property not having been sold, and the administration of the estate not being completed, one of the beneficiaries applied, under Rule 608, for an order for the administration of the estate by the Court. It appeared that the trustees had advanced sums of money to the applicant and other beneficiaries under the will, before setting aside a fund to provide incomes for the widow and daughters of the testator. No misconduct, willful neglect or default, unwarranted delay, or delatoriness on the part of the trustees, was found:—

Held, that the applicant could not, while retaining the payments made to her, set up the advances to herself and the others as a basis of complaint.

But the application was supported by the Official Guardian, on behalf of a daughter of the testator, who was *non compos mentis*; and she had not lost her right to complain of the action of the trustees.

Though, in the eyes of the law, the making of the advances was a breach of trust, it was a mere technical breach within the meaning of secs. 36 and 37 of the Trustee Act—the trustees had acted honestly and in good faith.

Trustees directed to sell, but having a discretionary right to postpone, may not postpone indefinitely; but, so long as they are able, ready, and willing to sell, and exercise their powers and discretion honestly, reasonably, and in good faith, the Court ought not to interfere.

An administration order made by MASTEN, J., in Chambers, was varied on appeal by directing that, notwithstanding anything contained therein or in Rule 611, the Referee, upon the reference for administration of the estate, should, in converting the estate pursuant to the order, have regard to the powers of sale conferred upon the trustees by the will, and their rights and discretion in reference thereto as to the time, manner, and terms of sale, and should give effect thereto, and should be guided and in these respects governed by the wishes of the trustees, unless it should be shewn and he should be of opinion that they were neglecting or refusing to execute the powers of sale and exercise their rights and discretion in reference thereto honestly, in good faith, and in a reasonable and timely manner.

Rule 614 applied.

Other breaches of trust alleged were discussed.

APPLICATION by Mary I. Benedict for an order for the administration under the direction of the Court of the estate, real and personal, of the Honourable Peter McLaren, who died on the 23rd May, 1919. The application was launched on the 31st October, 1921.

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The application was heard by MASTEN, J., in Chambers.

E. D. Armour, K.C., and *A. D. Armour*, for the applicant.

Wallace Nesbitt, K.C., *Britton Osler*, K.C., and *G. M. Huycke*, for Margaret E. Hall, supported the application.

F. W. Harcourt, K.C., Official Guardian, for Kathleen McLaren, supported the application.

J. B. Clarke, K.C., for the executors and trustees under the will of the deceased and for Sophia McLaren, James L. T. McLaren, and William McLaren, beneficiaries, opposed the application.

December 1, 1921. MASTEN, J.:—The material filed on the application is voluminous. Exception is taken by those supporting the motion to para. 11 of the affidavit of James L. T. McLaren and to the latter part of para. 2 of the affidavit of George Ritchie, sworn on the 19th November, 1921, as being scandalous. I have read and considered the paragraphs complained of, and I am clearly of opinion that the statements objected to are not admissible in evidence to shew the truth of any allegation that is material and relevant with reference to the question whether an administration order should be granted or refused. I therefore hold that the paragraphs in question are scandalous and should be expunged from the affidavits, with costs fixed at \$20 to be paid by the respondents: see *Christie v. Christie* (1873), L.R. 8 Ch. 499.

Coming now to the main application, I am of opinion that the respondents as trustees and executors are not on this application proved guilty of any moral misconduct nor of any wilful neglect or default, nor am I able to say that, considering the nature of the estate, any unwarrantable delay or dilatoriness on their part has been established.

It seems clear to me, however, that technical breaches of duty in the distribution of the estate—and these of a serious nature—have occurred; also that questions of grave difficulty have arisen in the administration of the estate and remain unsolved; and, further, that from the very nature of the assets constituting the estate further complications and difficulties are bound to arise. For these reasons, I am of opinion that an order for

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administration under the direction of the Court should be made; and I should add that I think it will be not less in the interest of the executors and trustees themselves than in that of the beneficiaries that they should have the protection of the Court in the further administration of the estate.

The usual order for administration will go, with a special clause that until the further order of the Court the executors and trustees shall have the conduct of the reference.

The reference is directed to J. A. McAndrew, Official Referee.

The executors and trustees appealed from the order of MASTEN, J.

December 21, 1921. The appeal was heard by MEREDITH, C. J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

H. J. Scott, K.C., and *J. B. Clarke*, K.C., for the appellants, argued that the administration order should not have been granted. The executors and trustees had not been guilty of any misconduct, neglect, default, or delay, or of any breaches of duty in the distribution of the estate: *Elliott v. Colter* (1919), 45 O.L.R. 361. If there was a technical breach of trust in advancing sums to the applicant and Mrs. Hall, these beneficiaries could not, while retaining the payments, complain of these advances. In making these advances the appellants had acted honestly and in good faith. There was no undue delay in realising upon the Virginia property; it could not be advantageously sold and converted by the ordinary methods; and the appellants should not be deprived of the right to fix the time, manner, and terms of the sale. The administration order would have a prejudicial effect upon the pending negotiations for sale. The refusal of information to Mr. Osler was owing to the pendency of these negotiations, and was reasonable and proper. By the will of the testator, the time and manner of conversion were discretionary with the trustees, and the Court should not interfere with this discretion: *Christie v. Christie*, L.R. 8 Ch. 499; *Re Ryan* (1900), 32 O.R. 224; *Re McCully*, *McCully v. McCully* (1911), 23 O.L.R. 156; *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571; *In re Charteris*, *Charteris v. Biddulph*, [1917] 2 Ch. 379.

E. D. Armour, K.C., and *A. D. Armour*, for Mary I. Benedict, the applicant for the administration order, respondent, contended that the learned Judge below was right in granting the order appealed from. The time for distribution had passed,

and after that time the executors had no discretion, but must convert. The appellants had been guilty of the technical breaches of duty referred to in the judgment appealed from. The fixing of the time, manner, and terms of sale of the Virginia property should be taken out of the hands of the trustees. Counsel complained particularly of the refusal of the trustees to give information to Mr. Osler.

F. W. Harcourt, K.C., Official Guardian, representing Kathleen McLaren and the infants interested, opposed the appeal.

Wallace Nesbitt, K.C., and *Britton Osler*, K.C., for Margaret E. Hall, who supported the original application, respondent, urged that the Virginia property should be put in the hands of some person who was accustomed to handle such properties, for sale.

Scott, K.C., in reply.

January 30, 1922. FERGUSON, J.A.:—Appeal by the trustees and executors named in the will of the Honourable Peter McLaren, deceased, from an order made or judgment pronounced by Masten, J., dated the 1st December, whereby, on the application of Mary I. Benedict, under Rule 608, he directed administration of the estate of the deceased.

The applicant is a legatee, and her application was supported by her sister Margaret E. Hall, also a legatee, and by the Official Guardian; three of the trustees are legatees; and Mr. Ritchie, the other, is beneficially entitled to a share in the proceeds of the sale of the Virginia property.

The main, if not the sole, purpose of the applicant is to divest the trustees of the power to fix the time, manner, and terms of any sale of the Virginia property, and counsel were agreed that, if the order stands without amendment, that purpose will have been accomplished, for Rule 611 reads:—

“(1) Where judgment for administration is granted the Master to whom the matter is referred shall proceed to administer the estate in the most expeditious and least expensive manner, and in doing so shall, without special direction, take:—

“(a) An account of the personal estate of the deceased, in the pleadings mentioned, come to the hands of his executors (or administrator);

“(b) An account of his debts;

“(c) An account of his funeral expenses;

“(d) An account of the said testator's legacies;

“(e) An inquiry as to what parts, if any, of the real and personal estate are outstanding or disposed of;

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“(f) An inquiry as to what real estate the deceased was seised of, or entitled to, at the time of his death;

“(g) An inquiry as to what incumbrances affect the real estate;

“(h) An account of the rents and profits of the real estate received by any party since the death;

“(i) An account of what is due to such of the incumbrancers as shall consent to sale in respect of their incumbrances;

“(j) An inquiry as to what are the priorities of such last mentioned incumbrances.

“(2) The Master shall, under any such reference, have power to deal with both the real and personal estate, including the power to give all necessary directions for its realisation, and shall finally wind up all matters connected with the estate, without any further directions, and without any separate, interim, or interlocutory reports or orders, except where the special circumstances of the case absolutely call therefor.

“(3) All money realised from the estate shall forthwith be paid into Court, and no money shall be distributed or paid out for costs or otherwise, without an order of a Judge, and on the application for an order for distribution, the Judge may review, amend, or refer back the report, or make such other order as may seem just.”

The power of sale, as granted by the will, reads:—

“All the residue of my property, wheresoever situate, shall be sold for cash or on credit, at such times, in such manner, and upon such terms as my said trustees in their discretion shall deem proper or expedient.”

The learned Judge whose order is appealed from found “that the respondents as trustees and executors are not on this application proved guilty of any moral misconduct nor of any wilful neglect or default, nor am I able to say that, considering the nature of the estate, any unwarrantable delay or dilatoriness on their part has been established. It seems clear to me, however, that technical breaches of duty in the distribution of the estate—and these of a serious nature—have occurred; also that questions of grave difficulty have arisen in the administration of the estate and remain unsolved; and, further, that from the very nature of the assets constituting the estate further complications and difficulties are bound to arise.”

The technical breaches of trust alleged are:—

(1) That the executors and trustees advanced sums to the applicant, her sisters, mother, and brothers, before setting aside

funds amounting to \$250,000 to provide income for the widow and for each of the daughters of the deceased.

(2) That the trustees have not sold the Virginia property and some small properties in Ontario.

(3) That by refusing information to Mr. Osler, solicitor for Mrs. Hall, they prevented him from interesting possible purchasers.

(4) That the time for distribution has arrived and the estate is not converted.

After a careful perusal of the affidavits, I am of opinion that the applicant and Mrs. Hall, having received advances, cannot, while retaining the payments, set up these and like advances to their brothers as a basis of complaint; to allow them to do so would, I think, be contrary to the well-known principle that one cannot make his own wrongful act the basis of a claim for equitable relief: the Court will not lend its aid to such a claimant.

But the application was supported, and this appeal is opposed, by the Official Guardian; he represents one of the daughters of the deceased who is *non compos*; she cannot be said to have lost her right to complain of advances being made before a fund of \$50,000 directed to be set aside for her benefit had been set aside. It is the duty of the Official Guardian to protect his wards, and to complain if the trusts have been ignored to their prejudice or possible prejudice. Great weight should be given to the statement of the Official Guardian that he deems it in the interest of Miss McLaren and the infants to support the application; had he taken a different position I would have thought that the order should not have been made, for I am of opinion that the adult applicant is not in a position fairly to complain of the making of the advances, also that the advances made were such as most men, placed, pressed, and driven as these trustees were by the real necessities of their cestuis que trust, would have made. Though, in the eyes of the law, the making of the advances was a breach of trust, it was, I think, a mere technical breach of trust within the meaning of secs. 36 and 37 of the Trustee Act, R.S.O. 1914, ch. 121. It is due to these executors and trustees to say that, in making the advances now complained of as a breach of trust, they acted honestly, and did what they, in good faith, believed to be in the best interest of all, and did not prefer one to another. To my way of thinking, these technical breaches of trust cannot fairly be made a ground for removing the trustees from their office or of controlling them in the management of the trust-estate ex-

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cept in so far as it is necessary to right the wrong done to those represented by the Official Guardian and to protect them against future acts of a like nature.

I shall now deal with the complaints of delay in realising and of refusal of information to Mr. Osler.

The learned Judge whose order is appealed from has found (1) no misconduct, (2) no wilful neglect or default, (3) no unwarranted delay, (4) no dilatoriness on the part of the trustees.

These findings are justified by the evidence, but counsel for the applicant stressed the refusal of information. Mr. Osler's letters, the reasons he therein set forth for making the request for information as to the Virginia property, and his statements as to the use he proposed to make of the information, demonstrate that the Virginia property is not one that may be advantageously sold and converted by following the usual and ordinary methods of sale or the practice in the Master's Office—clearly the property is an exceptional one, for which there are few purchasers, and these, purchasers who must be sought out and interested by an agent experienced in such transactions and acquainted with not only the properties but the "market," that is, in touch with dealers, traders, promoters, and operators in that kind of property. I am confident that such an agent would not devote his time, energy, and ability to the promotion and completion of such a sale if he were to be subject to outside interference or to the loss of his commission or other fruits of his labour by reason of the property being placed in the hands of another before he had had reasonable opportunity to complete the transaction and reap his just rewards.

The trustees assert (and their assertion is not questioned) that, at the time Mr. Osler requested the information, a sale of the Virginia property for \$6,000,000 was being negotiated, and that the negotiations have not yet been determined. In these circumstances, I am not only unable to find fault with the trustees, but am of opinion that they acted wisely and exercised reasonably the powers and discretion given them by the testator when he entrusted to them, and to them only, the power of sale.

That brings me to a consideration of the question: Is the order appealed from improper? Should it be rescinded and set aside or should it be amended?

The executors and trustees have acted honestly and diligently, and come into Court prepared to exercise the powers and

discretions vested in them by the testator, for their own benefit and the benefit of all persons interested, and asserting the right to do so—but they have been guilty of a technical breach of trust, of which the Official Guardian is entitled to take advantage.

The debts are paid, so that the applicant and those supporting her are persons applying to enforce the trusts created by the testator for their benefit.

“The sole ground, on which courts of equity proceed in cases of this kind, is to be deemed the execution of a trust:” Taylor’s Equity, p. 171, para. 390.

And the question arises: Does the order appealed from direct the execution of the trusts? or does it, without just or sufficient cause, deprive the objecting beneficiaries of a substantial right, i.e., the right to have the time, manner, and terms of sale of such a speculative and valuable property as the Virginia estate fixed by these trustees?

By the will, the period of distribution is fixed at the time the testator’s youngest child shall have arrived at the age of 40 years: that period had arrived at the date of the testator’s death, from which it is argued that the trustees were obliged to convert immediately; but I am of opinion that this argument is not sound, for, if given effect to, it would deprive the trustees of the power expressly given them to fix the time of sale—which, it seems to me, was not the intention of the testator, and is not the meaning of the words of his will. Yet such is the meaning and effect of the order appealed from, and it appears to me that therein lies error and just ground for complaint.

To allow the order appealed from to stand unamended would be to ignore the wishes of the testator, reverse his words, and substitute the direction of the Court for the direction of the testator, and for the discretion, opinion, and judgment of persons whom the testator deliberately selected and named as the persons who should fix the time, manner, and terms on which his property should be sold, the discretion, opinion, and judgment of a Court official.

The testator was a man of wealth, understanding, and affairs, and for many years a member of the Senate of Canada. He knew his properties, he knew his family, and he knew and trusted the men he selected to be his executors and trustees; he conferred upon them wide powers, which he no doubt deemed necessary and advisable in the interest of all the objects of his bounty; and, to my way of thinking, the Court should not ignore

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or disregard his wishes and desires, unless it is clearly demonstrated that these men have been shewn unwilling or unworthy to perform and execute the duties and trusts imposed and assumed. I am not impressed with the idea that the Court or its officers are better equipped than are the persons named by the testator to say when and for what price or on what terms and conditions a valuable and speculative property such as the Virginia property should be sold, or what steps should be taken or efforts made to bring about a sale thereof.

Opinions as to the salable value of the Virginia property will probably differ by millions of dollars—and, if the Court takes away from the objecting beneficiaries the right to say that this property shall not be sold except when and in such manner and on such terms as are approved by the persons named by the testator, it would seem to me the Court would be seriously interfering with the rights of the parties, and interfering in a way not justified by the circumstances or the authorities, for I am of opinion that the weight of authority is that if the trustees are given a discretion as to conversion or non-conversion of property, or are given a power and directed to convert, but the time and manner of the exercise of the power are discretionary, the Court will not interfere with the exercise of such discretion.

I do not mean that trustees directed to sell, but having a discretionary right to postpone, may postpone indefinitely, but rather that, so long as they are able, ready, and willing to sell, and exercise the powers and discretion honestly, reasonably, and in good faith, the Court ought not to interfere.

In *Re Sievert*, ante 305, Middleton, J., in a judgment dated the 5th December, 1921, affirmed by this Court on the 22nd December, 1921, states the law (setting out the words of Middleton, J., *q. v.*)

See also *In re Charteris*, *Charteris v. Biddulph*, [1917] 2 Ch. 379.

There is no evidence to support a suggestion that these trustees have not acted in good faith, or are not prepared, honestly, faithfully, and reasonably, to convert the testator's estate, in accordance with the powers and discretions given them by the will. Therefore, if the Official Guardian were not supporting the applicant, I would allow the appeal; but, in view of the position taken by the Official Guardian and his rights and duties, and because I think it in the interest of the trustees, as well as those represented by the Official Guardian, that the trustees be protected against being coerced or influenced into fur-

ther or future indiscretions, and against assertions that the Virginia property is not being handled fairly and honestly, or, if sold, not sold to advantage—I would not rescind the order, but would amend it, so that the trustees and those represented by the Official Guardian may be protected as indicated without depriving those appealing of their right to have the time, manner, and terms of sale fixed by the trustees.

That, I think, is the meaning and effect of an administration order granted under Order LV., r. 4, of the English practice—see Williams on Executors, 11th ed. (1921), pp. 1615, 1616, where the law is stated as follows:—

“Even a judgment for administration does not deprive executors or trustees of the right to exercise a discretionary power vested in them, except so far as the exercise conflicts with the order; for instance, they can exercise a power of appointing new trustees but the Court will see that improper persons are not appointed, and if a person of whom the Court does not approve is appointed, it will call on the trustees to make a fresh appointment. The fact that the decree directs the appointment of new trustees does not take from the trustees their right of appointment, though after decree they can only exercise it subject to the supervision of the Court. An administration decree does not prevent trustees from exercising a power of sale.

“Where a testator has given a pure discretion to trustees as to the exercise of a power, the Court will not enforce the exercise of the power against the wish of the trustees or one of them, if such one reasonably entertains a different opinion from that of his co-trustees as to the desirability of exercising it in the particular manner proposed, but it will prevent them from exercising it improperly; and even where the power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it.”

But I have not found in the English Rules one corresponding with our Rule 611, and, for that reason, I think it necessary that the effect of that Rule should be modified by special order and direction. See Rule 614, which provides that “special directions touching the carriage or execution of the judgment may be given as may be deemed expedient”

For these reasons, I would amend the order appealed from by directing that, notwithstanding anything therein contained or contained in Rule 611, the Referee shall, in converting the estate pursuant to this order, have regard to the powers of sale

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conferred upon the trustees by the will, and their rights and discretion in reference thereto as to the time, manner, and terms of sale, and shall give effect thereto, and shall be guided and in these respects governed by the wishes of the trustees, unless it be shewn and he is of opinion that the trustees are neglecting or refusing to execute the powers of sale and exercise their rights and discretion in reference thereto honestly, in good faith, and in a reasonable and timely manner.

Costs of all parties out of the estate.

MACLAREN and MAGEE, J.J.A., agreed with FERGUSON, J.A.

HODGINS, J.A.:—I agree in the judgment proposed by my brother Ferguson, though I do not go as far as he is able to do in approving of the conduct of the trustees in refusing to give information to Mr. B. Osler as to the exact location and character of the Virginia property. The negotiations then pending were very dimly outlined. Nothing of value as to their present position has been vouchsafed to enable the Court to say that then or now they were or are of such a nature or ever arrived at such a stage that the giving of this information would imperil their successful conclusion. It is this consideration that leads me to think that the right of those interested to appeal to some authority would probably correct the impulse of the executors and trustees to resent inquiry.

With regard to what are called technical breaches of trust in the advancing of moneys to the applicant and others, the circumstances under which they were made appear to me to give some local colour to the sardonic observation of Lord Justice Selwyn that the only use of a trustee was to commit judicious breaches of trust.

MEREDITH, C.J.O., agreed in the judgment of FERGUSON, J.A., with the doubt suggested by HODGINS, J.A.

Order varied in the manner stated by FERGUSON, J.A.

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[APPELLATE DIVISION.]

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WELCH V. DOMINION TRANSPORT CO.

Jan. 30.

Animals—Injury Done by Horses Left Unattended—Escape from Private Property to Adjoining Lot—Collision with Vehicle—Liability of Owner of Horses for Injury—Damages—Remoteness—Negligence.

The defendant company's horses, attached to a lorry, were left by the company's servant standing, unattended, upon private property; they were weighted, but not securely; they proceeded, dragging the lorry after them, to an adjoining lot, where the plaintiff's automobile was lawfully standing, and drove the tongue of the lorry against the vehicle, causing injury thereto:—

Held, that the plaintiff was entitled to recover damages for the injury: the damages were a natural consequence of the way in which the horses were left standing, and not too remote.

The rule applied in *Street v. Craig* (1920), 48 O.L.R. 324, is an unsatisfactory one and should not be extended—it had no application here.

Seemle, that the evidence in this case established negligence, if that were necessary.

THE following statement of the facts is taken from the judgment of MEREDITH, C.J.O.:—

This is an appeal by the defendant company from the judgment of the First Division Court of the County of York, dated the 29th November, 1921, which was directed to be entered by acting Judge Irwin, after the trial before him, sitting without a jury, on that day. The judgment was for the recovery by the plaintiff of \$120 damages and his costs of the action.

The action is brought to recover damages for injuries done to an automobile caused by the horses attached to a lorry of the appellant colliding with the automobile. The automobile was standing upon a vacant lot, and was there by the permission of the owner of the lot. The lorry was employed in delivering goods to one of the occupants of a building adjoining the vacant lot, between which and the building there was no fence. The lorry had been driven from the highway on to a private lane or court-yard adjoining the building, and the driver had left it unattended while he went into the building on his errand. He had, however, before going in, attached to one of the horses two weights, weighing about 25 pounds, which rested upon the ground. While the driver was in the building, the horses walked away from where they were left standing, and caused the injury of which the respondent complains, by the tongue of the lorry being driven against the automobile. The evidence does not disclose the reason for the action of the horses, and there is nothing to shew that anything unusual occurred to cause them to do what they did.

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December 22, 1921. The defendant company's appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

H. W. A. Foster, for the appellant company, argued that there was no difference in principle between this case and that of animals which, being driven along a highway, escape upon adjoining unfenced land and cause damage. In neither case would the trespass be actionable unless negligence were proved: *Street v. Craig* (1920), 48 O.L.R. 324, 56 D.L.R. 105. In the case at bar negligence had not been proved; and, if it had been, the damage was too remote: *Rylands v. Fletcher* (1866), L.R. 1 Ex. 265; *Manzoni v. Douglas* (1880), 6 Q.B. D. 145.

Gideon Grant, K.C., for the plaintiff, respondent, contended that the decision in the *Street* case rested on a different principle from that which should decide the present case, and so was inapplicable. The horses in the case at bar had not strayed from the highway, but from an adjoining unfenced lot. The principle applicable here was: "The owner of an animal in which by law the right of property can exist, is bound to take care that it does not stray on to the land of his neighbour, and is liable for any trespass it may commit, and for the ordinary consequences of that trespass;" *Whalley v. Vandergrand* (1918), 44 D.L.R. 319. Counsel also referred to *Crawford v. Upper* (1889), 16 A.R. 440; *Cox v. Burbidge* (1863), 13 C.B. N.S. 430; and *Tillett v. Ward* (1882), 10 Q.B.D. 17.

Foster, in reply.

January 30, 1922. The judgment of the Court was read by MEREDITH, C.J.O. (after setting out the facts as above):—The appellant seeks to escape liability by the application of the rule of law which was applied in *Street v. Craig*, 48 O.L.R. 324. That rule, as stated by my brother Middleton (p. 329), is that "where a beast is being lawfully driven upon a highway, and escapes upon adjoining unfenced land, trespass is not actionable without proof of negligence."

The rule has, in my opinion, no application to the case at bar. The appellant's horses did not escape from a highway upon which they were lawfully being driven, but from private property on to the adjoining lot.

The rule of law which is invoked by the appellant is, as my brother Middleton says, an unsatisfactory one, and, in my opinion, ought not to be extended beyond the limits which have been assigned to it by the decided cases.

It cannot be said the the damages are too remote: they were,

I think, a natural consequence of the way in which the horses were left standing. As the result shewed, they were not securely weighted, and there was evidence of an onlooker that they were restive. If it were necessary for the respondent to establish negligence, it was, I think, established.

Appeal dismissed with costs.

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GUARDIAN REALTY CO. OF CANADA LIMITED v. JOHN STARK & CO.

Jan. 30.

Landlord and Tenant—Lease—Option of Renewal—When Exercisable—Acceptance of Option after Expiration of Term—Lessees Continuing in Possession—Sanction of Lessor—Intention to Accept—Knowledge of Lessor—Condition—Performance—Reasonable Time.

A lease of offices in a building contained this clause: "The lessees are hereby granted the option of renewing this lease for a period of five years from the expiration of the term granted," at a specified annual rental and "on the same terms and conditions as herein set out except that as to renewal." The lessees did not give notice of accepting the option before the expiration of the term; but, shortly before the expiration, they paid for some structural changes in the demised premises, and they continued to occupy after the expiration of the term, to the knowledge of the lessor. Five days after the term had expired they wrote to the lessor stating that they had accepted the option, and refused to give up possession, whereupon this action was brought to recover possession:—

Held, that, upon the English authorities, it is essential to the exercise of the option to renew after the expiration of the original term that the retention of possession by the tenant shall have been with the consent of the landlord.

Moss v. Barton (1866), L.R. 1 Eq. 474, *Buckland v. Papillon* (1866), L.R. 2 Ch. 67, and other cases, considered.

If the rule is qualified in that manner, there were in this case facts and circumstances which justified the conclusion that the lessor knew of the lessees' intention to renew, and that their possession after the expiration of the term was with the sanction of the lessor. But in *Brewer v. Conger* (1900), 27 A.R. 10, which must be followed, the rule was broadly stated without that qualification.

Per HODGINS, J.A.:—In the three cases referred to, the wording of the option was different—the lessee must ask for or desire the renewal, and when he did so he could then enforce his right. If, in these circumstances, it could be determined that, given a conditional option, his right to perform the condition did not terminate unless and until the lessee indicated by some act or by laches that he did not intend to perform the condition, or had no desire to exercise the option, it was not difficult to hold that, in this case, the right of the lessees to renew, in the sense of causing it to continue, had not expired when the lessees gave the notice of acceptance. If the question of reasonable time arose, 5 days after renewal was possible could not be said to be unreasonable.

Judgment of ROSE, J., *ante* 243, reversed.

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AN appeal by the defendants from the judgment of ROSE, J.,
ante 243.

December 22, 1921. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A

R. J. McLaughlin, K.C., for the appellants, argued that the option for renewal of the lease need not be exercised during the term, but that it may be exercised at any time, so long as the tenant has done nothing to shew that he does not intend to avail himself of it, or at any rate so long as he continues in possession of the demised premises. Here the possession of the appellants up to the 5th January had been with the sanction of the landlords. He referred to *Fry's Specific Performance*, 5th ed. (Canadian Notes), p. 541, para. 1105; *Brewer v. Conger* (1900), 27 A.R. 10, at pp. 13 and 14; *Moss v. Barton* (1866), L.R. 1 Eq. 474; *Buckland v. Papillon* (1866), L.R. 2 Ch. 67; *Allen v. Murphy*, [1917] 1 I.R. 484; *Bennett v. Stodgell* (1916), 36 O.L.R. 45, 28 D.L.R. 639; *In re Leeds and Batley Breweries Limited and Bradbury's Lease*, [1920] 2 Ch. 548.

K. F. Mackenzie, for the plaintiff company, respondent, contended that the option must be exercised during the term of the lease. In support of this contention he referred to *Hersey v. Giblett* (1854), 18 Beav. 174; *Lindsay v. Robertson* (1899), 30 O.R. 229; *Nicholson v. Smith* (1882), 22 Ch. D. 640, at pp. 656, 657; *Halsbury's Laws of England*, vol. 7, p. 414, and vol. 18, p. 462; *Wills v. Stradling* (1797), 3 Ves. Jr. 378; *Dewson v. St. Clair* (1856), 14 U.C.R. 97; *Lewis v. Stephenson* (1898), 67 L.J.Q.B. 296, 18 L.T.R. 165.

McLaughlin, in reply, referred to *Farley v. Sanson* (1902), 5 O.L.R. 105.

January 30, 1922. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment of ROSE, J., dated the 17th November, 1921, pronounced after the trial before him sitting without a jury at Toronto on the 30th day of the previous month.

The question for decision is as to the right of the appellants to a renewal of a lease from the respondent to them.

The lease is dated the 15th November, 1915, and is for a term of 5 years commencing on the 1st day of January, 1916. It contains, among others, the following provisions:—

“And it is hereby agreed that if the lessee shall continue to occupy the demised premises after the expiration of the term hereby granted with the consent of the lessor then unless there shall be some written agreement to the contrary the lessee shall be deemed to be a monthly tenant at a monthly

rental equivalent to the monthly rent herein provided for payable in advance and all the terms and conditions hereof shall so far as applicable apply to such monthly tenancy."

"The lessees are hereby granted the option of renewing this lease for a period of five years from the expiration of the term hereby granted at a rental of \$2,575 per annum on the same terms and conditions as herein set out except that as to renewal."

The lease is on a printed form, of which the first of these provisions forms part; the other provision is a later one and is type-written on a slip attached to the lease.

In my view, reading these provisions together, the first of them is intended to apply if the lessees do not exercise the option which the later provision gives, and does not, of course, have effect if the option is exercised.

The contention of the respondent is that, if it is intended to exercise the option, it must be accepted during the term of the lease, and that view was adopted by the learned trial Judge. The appellants contend that the option need not be accepted during the term, but that it may be accepted at any time, so long as the tenant has done nothing to shew that he does not intend to avail himself of it, or at all events so long as he continues in the occupation of the demised premises.

Before dealing with the legal question, it will be convenient to narrate the facts or such of them as are material to be considered in dealing with that question.

The demised premises are part of an office building owned by the respondent, in which it has its offices. In the month of June, 1920, the appellants desired to have some changes made in their offices, and the respondent at their request had them made at a cost of \$348.50, which the appellants paid; further alterations were made in the following September, and were made in the same way and were paid for by the appellants, the cost being \$24.82. It is beyond question that the appellants at this time intended to exercise their right to the renewal, and that they never abandoned that intention, though there is no evidence that it was, at any time before the expiration of the term, formally communicated to the respondent. Mr. Dawson, the respondent's secretary-treasurer, said on cross-examination that he "would think" that the appellants would not have paid for these alterations if they intended to leave the premises at the end of the year. The appellants continued to occupy after the expiration of the term, and this must have been known to the respondent. Nothing occurred until about

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the 5th January, 1921, when Mr. Dawson and the appellants met, and the former took the position that the lease had expired and that the option was gone, and the appellants insisted that they were rightly in possession under the option which they had decided to exercise. On the 7th January the appellants wrote to the respondent the following letter:—

“In accordance with our lease of offices 504 and 505 Royal Bank building, dated the 15th November, 1915, we have duly accepted the option of renewing this lease for the period of five years from the expiration of the term therein granted, at the rental therein fixed, namely, \$2,575 per annum, and on the other terms and conditions as therein set out, except as to a further renewal, and we herewith enclose our cheque for \$214.58 in payment of rent for current month.”

On the 10th January the respondent returned the cheque with a letter which contained the following statement:—

“Our position has already been pointed out to you by the writer in a conversation which preceded your letter in which we notified you that your lease and option had expired and that you were in the position of overholding tenant.

“While we do not wish to inconvenience you, we wish to state that we do not propose to grant you a new lease on the terms of the expired option; and, as you intimate that you do not care to take a lease on any other terms, we should be glad to take over possession of the premises at your convenience. In the meantime you occupy the position of overholding tenants and will be liable for double rent.”

That letter was followed by a notice which reads as follows:—

“In the matter of the Landlord and Tenant Act.

“To Messrs. John Stark & Co.

“Take notice that pursuant to the provisions of the Landlord and Tenant Act we hereby demand that you forthwith deliver to us possession of office numbers 504 and 505 of the Royal Bank building formerly held by you under lease dated 15th November, 1915, which lease expired on December 31st, 1920.

“Dated at Toronto this 17th day of January, 1921.

“Guardian Realty Company of Canada Limited.

“L. M. Wood,

President

“W. C. Dawson,

Secy.-Treas.”

The cases relied on by the appellants are *Moss v. Barton*, 35 Beav. 197, L.R. 1 Eq. 474; *Buckland v. Papillon*, 35 Beav. 28, L. R. 1 Eq. 477, L. R. 2 Ch. 67; and *Brewer v. Conger*, 27 A. R. 10.

In *Moss v. Barton* the facts were that by an agreement in writing the predecessor in title of the defendants agreed to let the premises to the plaintiff for 3 years from November, 1850, and at the request of the plaintiff to grant him a lease of the premises for 5, 7, 14, or 21 years from the expiration of the 3 years. The plaintiff occupied under the lease during the 3 years, and continued in occupation after they expired; the plaintiff for some time never attempted to exercise his option, and the defendants seemed to have treated him as a tenant from year to year. There were negotiations between the plaintiff and the defendants for the purchase of the premises, and in a letter to them written in February, 1862, the plaintiff stated that he had the option of quitting the premises at the end of the year or of taking a lease for a lengthened period, and he proposed taking a lease for 7, 14, or 21 years, at his option, if the rent were considerably reduced. Nothing came of this. In September, 1864, the defendants gave the plaintiff notice to quit, and in the following month he claimed a lease for the extended term.

The Master of the Rolls held that the plaintiff was entitled to a decree for specific performance unless he had done something to deprive himself of that right. He pointed out that there was no time specified in the agreement within which he was to call for the lease, and said that "both parties may have considered that he was afterwards holding over as tenant from year to year;" that, if the landlord thought fit to allow him to hold the property from year to year, "there was nothing to prevent him from insisting on the lease; his right to take a lease would exist at any time, unless he gave it up. . . Why did they not . . . call on him to exercise his option? If they knew of its existence, they also knew that the right continued until positively waived; but they did nothing" (35 Beav. at p. 200).

The learned Judge referred to a previous decision of his own in *Hersey v. Giblett*, 18 Beav. 174, which, he said, shews "that a person having such an option may exercise it at any time while he remains tenant, if the landlord does not call upon him either to exercise or decline it at an earlier period. That is when no time is specified in the agreement within which the option is to be exercised."

A reference to the report of that case shews that the right may be lost by laches.

In *Buckland v. Papillon* the Master of the Rolls followed *Moss v. Barton*, in which he said that he held "that the lessee, by holding over with the assent of the lessor, did not destroy

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the original agreement, or enable the lessor successfully to contend that it had been waived" (35 Beav. at pp. 286, 287).

Buckland v. Papillon went to appeal (1866), L.R. 2 Ch. 67, and the judgment of the Master of the Rolls was affirmed. Delivering the judgment of the Court, the Lord Chancellor, after referring to the argument that the plaintiff was bound to exercise his option before the expiration of the term, said (p. 70):—

"Now, as to this, it must be observed that there was no limitation whatever of the time within which Bloxam was to exercise his option. If, during the course of 3 years, he had determined to have a lease for 7 years, that would be from the date of the agreement, and he would only have it for the portion of time which remained to run. Undoubtedly, supposing that at the end of 3 years Bloxam had chosen to leave the place, that would have determined his option; but he continued in possession, and so became tenant from year to year, under the terms of the original agreement. I do not mean to include in those words the right to demand a lease, for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not. As the landlord did not choose to do so, it appears to me that the time was unlimited in which the tenant could demand a lease. As long as he continued tenant with the sanction of the landlord, so long he retained his option."

In *Brewer v. Conger* the question arose in a redemption action, out of a claim by the defendant Allen that she was lessee of the lands and entitled to redeem the plaintiff. The defendant Allen was lessee under a lease dated the 24th March, 1887, which expired on the 10th May, 1897. The lease contained a covenant that "they (the lessors) will, at the expiration of the term hereby granted, grant unto the said lessee, his heirs, executors, administrators, or assigns, another lease of the premises hereby demised for a further period of 10 years . . . provided the said lessee, his heirs, executors, administrators, or assigns, should desire to take a further lease of said premises." The land was vacant when the lease was made, and the lease provided for the lessee and his assigns being allowed two months after the expiry of the term or renewal term to remove

any buildings he had erected on the lands. The defendant Allen was the assignee of the lease; she remained in possession by her tenants after the expiration of the term, and took no steps to remove the buildings that had been erected on the land. Delivering the judgment of the Court, Maclellan, J. A., referred to *Moss v. Barton* as a weaker case than the one he was dealing with, and relied on part of the passage from the judgment of the Lord Chancellor in *Buckland v. Papillon* which I have quoted, in support of the opinion he expressed that all that was essential to entitle the tenant to a renewal was the existence of the desire to have it; though he added:—

“No doubt the lessor had a right to know, within a reasonable time, whether there was a desire or not. That could be ascertained by inquiry, if it was thought to be uncertain, or it might be plainly indicated by conduct and circumstances” (27 A. R. at p. 13).

It is to be observed that the defendant Allen had endeavoured to inform the plaintiff of her desire to have a renewal. She had, before the expiration of the term, written two letters to her, to an address in California where the plaintiff was, but they were returned through the dead letter office, and her desire to renew was communicated and known to the plaintiff's solicitor also before the expiration of the term.

Nicholson v. Smith, 22 Ch. D. 640, was relied on by the respondent's counsel. It was there held that notice of the intention to renew before the expiration of the term was essential, but the provision for renewal in that case was that the lessor would at any time before the expiration of the term, when required by the lessee, grant the renewal. It is clear that, as the renewal was to be granted before the expiration of the term, the request must have preceded the expiration of the term.

Lewis v. Stephenson, 67 L. J. Q. B. 296, 78 L. T. R. 165, was also relied on by counsel for the respondent. In that case Bruce, J., delivering judgment, said that he thought that the provision of the lease, which was that the term was to be 3 years “with the option of renewal,” “must be taken to mean within a reasonable time before the expiration of the original term.” This statement was merely *obiter*, because the application for renewal was made before the expiration of the term.

In *Allen v. Murphy*, [1917] 1 I.R. 484, the Irish Court of Appeal dissented from that view unless it was confined to cases in which the provision is that the application for the renewal must be made before the expiration of the lease.

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In *In re Leeds and Batley Breweries Limited and Bradbury's Lease*, [1920] 2 Ch. 548, 552, Peterson, J., discussed *Buckland v. Papillon*, and treated it as establishing that in order to entitle the tenant to exercise his option his retention of possession must have been with the sanction of his landlord.

If unfettered by authority, my view of the result of the English cases would be that it is essential to the exercise of the option to renew after the expiration of the original term, that the retention of possession by the tenant must have been with the assent of the landlord. However, in *Brewer v. Conger* the rule is broadly stated without that qualification, and we are bound to follow that case. It is true that it is suggested that the landlord's knowledge of the tenant's intention to renew may be indicated by facts and circumstances from which that knowledge might be inferred, and indeed there was evidence that his intention to renew was in fact communicated to the plaintiff's solicitor.

I am, however, of opinion that, if the rule is qualified as I have said I think it is by the English cases, there were, in the case at bar, facts and circumstances that justify the conclusion that the respondent knew of the appellants' intention to renew, and that the appellants' possession after the expiration of the term was with the sanction of the respondent. The nature of the alterations which at their request the respondent made, and for which they paid, was an indication to the respondent that they did not intend to leave the premises on the expiration of the term. According to the testimony of the appellant Harry L. Stark, in discussing the question of those alterations, the respondent's manager said that he thought that the appellants should pay for them "on account of the renewal of the term and the rent". The manager of the respondent was called as a witness after that testimony was given and did not contradict it. Then, as I have said, the respondent's office was in the same building, and the respondent must have known that the appellants did not remove from the demised premises on the expiration of the term, and knew that the appellants were continuing in possession and made no objection to their doing that, or gave any indication that it viewed the possession as wrongful, or otherwise than rightful, until the 5th January, when, at the interview between Mr. Dawson and them, they took the position that they were entitled to the renewal, and he for the first time contended that the lease had expired and the option was at an end.

The inference I draw from this is that the possession up to

the 5th January, when the right to the renewal was insisted on by the appellants, was with the sanction of the landlord within the meaning of the English cases as I understand them.

For these reasons, I am of opinion that the appeal should be allowed with costs and that the judgment of the learned trial Judge should be reversed and that there should be substituted for it judgment dismissing the action with costs.

MACLAREN, MAGEE, and FERGUSON, JJ. A., agreed with MEREDITH, C. J. O.

HODGINS, J.A.:—The words in the lease are in themselves significant. They are, “the lessees are hereby granted the option of renewing this lease.” In the cases discussed before us the phrasing was different, and in each instance required that the lessee must ask for the renewal (*Moss v. Barton* and *Buckland v. Papillon*) or desire it (*Brewer v. Conger*), and when he did so he could then enforce his right. If, under those circumstances, it could be determined that, given a conditional option, the right to perform the condition did not terminate unless and until the lessee indicated by some act or by laches that he did not intend to perform the condition, or had no desire to exercise his option, it is not difficult to hold that, in this case, the right of the lessees to renew the lease, in the sense of causing it to continue, had not expired on the 5th January. If the question of reasonable time arises, then 5 days after renewal was possible cannot be said to be unreasonable.

Apart from this view, I agree with the analysis of the cases made by my Lord the Chief Justice and with the conclusions he draws from them, and concur in allowing the appeal.

Appeal allowed.

[Affirmed by the Supreme Court of Canada.]

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[APPELLATE DIVISION.]

Jan. 30.

CLARKE v. HURON COUNTY FLAX MILLS.

Appeal—To Divisional Court—Right of Appeal—County Court Action—Order of County Court on Appeal from Taxation of Costs—County Courts Act, R.S.O. 1914, ch. 59, sec. 40.

An appeal to a Divisional Court of the Appellate Division of the Supreme Court of Ontario, by the claimants in an interpleader matter, from an order of a County Court dismissing the claimants' appeal from the taxation of certain costs which they were, by an order of the County Court, directed to pay, was dismissed upon the ground that an appeal from such an order did not lie.

Section 40 of the County Courts Act, R.S.O. 1914, ch. 59, considered. *Leonard v. Burrows* (1904), 7 O.L.R. 316, approved and followed.

The order was not in its nature final, but merely interlocutory (subsec. 2 of sec. 40). The general words of subsec. 2 exclude from the right of appeal any order or proceeding in interpleader proceedings (clause (b) of sec. 40 (1)) which is not final but merely interlocutory.

The order did not dispose of a "right or claim" within the meaning of clause (c)—those words refer to a substantive right or claim.

The enactment of clause (d) of sec. 40 (1) shows that only such matters of taxation as that clause deals with should be the subject of appeal to a Divisional Court.

Quære, as to the right to appeal from an order made upon appeal from a taxation of costs in an action in the Supreme Court of Ontario.

Talbot v. Poole (1893), 15 P.R. 274, considered.

Per HODGINS, J.A.:—The decision in *Leonard v. Burrows*, when properly understood, is in accord with that in *Blakey v. Latham* (1889), 43 Ch. D. 23. The decisions should not be extended so as to include what is not literally "working out" or interpreting the judgment by the officers of the Court, nor so as to preclude appeals from taxations in actions in the Supreme Court of Ontario.

The appeal was dismissed without costs, because the taxing officer had allowed costs to which the respondents were not entitled.

APPEAL by the claimants in an interpleader matter from an order of the County Court of the County of Huron, dated the 21st December, 1921, dismissing their appeal from the taxation of certain costs which they were (by an order of the County Court dated the 7th October, 1921), directed to pay.

January 19 and 20. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. R. Roaf, for the appellants.

D. C. Ross, for the respondent the Sheriff of Huron.

W. M. Sinclair, for the respondents the execution creditors.

January 30. MEREDITH, C.J.O.:—It was objected *in limine* that no appeal lies to this Court from the order which the appellants attack.

Section 40 of the County Courts Act, R.S.O. 1914, ch. 59, makes provision for appeals from these Courts.

It provides that:—

“40.—(1) An appeal shall also lie to a Divisional Court at the instance of any party to a cause or matter from

“(b) Every decision or order made by a Judge in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees;

“(c) Every decision or order in any cause or matter disposing of any right or claim; and from

“(d) Any decision or order of a Judge, whether pronounced or made at the trial, or on appeal from taxation or otherwise, which has the effect of depriving the plaintiff of County Court costs on the ground that his action is of the proper competence of the Division Court, or of entitling him to County Court costs on the ground that the action is not of the proper competence of the Division Court.

“(2) This section shall not apply to an order or decision which is not final in its nature, but is merely interlocutory.”

In *Leonard v. Burrows* (1904), 7 O.L.R. 316, it was decided, by a Divisional Court, that an order made by a Judge of a County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon a taxation of the plaintiffs' costs of the action awarded by the judgment was in its nature interlocutory and not final, within the meaning of sec. 52 of the County Courts Act, R.S.O. 1897, ch. 55, and that no appeal lay to a Divisional Court of the High Court.

Delivering the judgment of the Court, Street, J., said: “It is argued for the defendant that this order disposes of the plaintiffs' right to costs on the County Court scale, and that therefore it is in its nature final; but it is manifest that the Act did not contemplate an appeal from every order made by a Judge of a County Court. Appeals are limited to those orders which are in their nature final and not merely interlocutory. In the present case the rights of the parties as to the matters in litigation were finally disposed of by the learned Judge after the trial of the action, and it was in working out that judgment that the order appealed against was made. If an appeal lies in the present case, then it must follow that it will lie from the ruling of the taxing officer upon any disputed item in a bill of costs in the County Court, which has first been dealt with by an order of the Judge of the County Court affirming or disaffirming it.”

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Section 52 of ch. 5 of R.S.O. 1897 is the same as sec. 40 of ch. 59, R.S.O. 1914, with the exception of the provision contained in clause (*d*), which was enacted by sec. 13 of 4 Edw. VII. ch. 10, doubtless in consequence of the decision to which reference has been made.

So far as I am aware, the correctness of this decision has never been questioned in any decided case; and, according to the well-established rule in matters of practice, such a decision ought not now to be departed from, even though we were of opinion that it is wrong. I do not, however, think it is wrong. The reasoning of my brother Street commends itself to me as sound.

There is, besides this, another reason why we should hold that the order in question is not, in the present state of the law, appealable. The provisions of clause (*d*) indicate clearly, I think, that the Legislature intended that an order made on an appeal from a taxation should not be appealable. If the right of appeal in such a case were conferred by clause (*c*), it is clear that such an appeal as is provided for by clause (*d*) would be within it, and therefore I think that the enactment of clause (*d*) shews that only such matters of taxation as the clause deals with should be the subject of appeal to a Divisional Court.

It is to be observed that the words of clause (*c*) are, "disposing of any right or claim." I do not think that these words extend to matters that may arise on a taxation—but rather to what may be called substantive rights or claims. In one sense a right to particulars is a right, and a final one, but it can hardly be contended that it is such a right as clause (*c*) deals with, or that an order for particulars or dismissing a motion for particulars is appealable.

In *Talbot v. Poole* (1893), 15 P.R. 274, it was decided by a Divisional Court consisting of Armour, C.J., and Street, J., that an order dismissing an appeal from a certificate as to the taxation of costs of a High Court action was appealable. No reasons for the decision are given, and it is singular that that case was not cited or referred to in *Leonard v. Burrows*.

I express no opinion as to the right to appeal from an order made upon an appeal from a taxation in an action in the Supreme Court of Ontario. Granting that an appeal lies, in my opinion the provisions of clause (*d*) of sec. 40 (1) require that a different construction be placed upon the general words of clause (*c*). There is also a difference between the provisions of subsec. 2 and the provision of the Judicature Act.

The language of subsec. 2 is: "an order or decision which is not final in its nature, but is merely interlocutory:" but the provision of sec. 68 of the Judicature Act, R.S.O. 1887, ch. 44, is that there shall be no appeal to a Divisional Court or to the Court of Appeal from an interlocutory order in case prior to the Ontario Judicature Act, 1881, there would have been no relief from a like order, by an application to a Superior Court or by an appeal to the Court of Appeal, and that is substantially the provision of sec. 25 of the present Judicature Act.

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It was argued by Mr. Roaf that clause (b) gives the right of appeal from any order or decision in interpleader proceedings. The answer to that argument is that the general words of subsec. 2 exclude from right to appeal an order or decision which is not final but is merely interlocutory.

I would dismiss the appeal without costs. I say without costs because I think that the taxing officer allowed costs to which the respondents were not entitled.

MACLAREN, MAGEE, and FERGUSON, J.J.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—The reason for the decision in *Leonard v. Burrows*, 7 O.L.R. 316, is found in this sentence: "In the present case the rights of the parties as to the matters in litigation were finally disposed of by the learned Judge after the trial of the action, and it was in working out that judgment that the order appealed against was made." In other words, the right or claim to costs was decided by the trial Judge, and the order appealed from affected only the correctness of the construction put by the taxing officer on the language used by the trial Judge—clearly an interlocutory matter. The right to the costs had been in fact disposed of, though not in clear terms, and this order did nothing but interpret it. The view of Street, J., thus understood, is in accord with that of the Court of Appeal in England in *Blakey v. Latham* (1889), 43 Ch. D. 23, where an order setting off judgments for costs under different orders in an action was held to be interlocutory, as it was merely working out the directions contained in the final judgment in the action. The judgment in *Leonard v. Burrows* may be correct and yet may not govern this case. Notwithstanding the narrow foundation on which the judgment rests. its effect is of more importance in most cases than the question of quantum. Hence the statutory provision, R.S.O. 1914, ch. 59, sec. 40 (1) (d), which recognises the restricted character of that decision. I am not disposed to quarrel with the views ex-

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pressed by the eminent Judges in either case, but I do not think they should be extended so as to include what is not literally "working out" or interpreting the judgment by the officials of the Court; in other words, the substantive rights conferred by the judgment itself which the parties may enforce by process or otherwise. Nor do I think these decisions preclude us from holding that under our practice a different rule may exist on appeals from taxation in actions in the Supreme Court of Ontario. The right to appeal from a Judge in Chambers in such a matter, affirmed in *Talbot v. Poole*, 15 P.R. 274, has been exercised for nearly 30 years, and in 1905 was exercised in *Campbell v. Baker* (1905), 9 O.L.R. 291.

It may be that this right is now, if the Judge's order is treated as an interlocutory one, as to which I decide nothing, subject to Rule 507.

This appeal should be dismissed, but without costs. It is hard to understand how it comes that the counsel fees objected to could have been taxed as at a trial in a case where the interpleader issue was neither delivered nor tried.

Appeal dismissed without costs.

[MULOCK, C. J. Ex.]

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Jan. 31.
May 23.

BURNS V. ROYAL BANK OF CANADA.

BURNS V. GRAHAM.

Bankruptcy—Mortgage Made by Insolvent Company to President within two Months before Adjudication of Bankruptcy—Payment Made to Creditor—Actions by Trustee in Bankruptcy to Set aside—Intention of Company—Preference—Fraudulent Preference—Evidence—Presumption—Rebuttal—Bankruptcy Act, sec. 31 (1), (2) (10 & 11 Geo. V. ch. 34, sec. 8)—Dismissal of Actions—Costs—Payment by Trustee Personally—Special Reason for not Directing Payment out of Estate—Style of Actions—Right to Vary Judgment where not Formally Entered—Intituling of Actions—Bankruptcy Rules 7, 54 (3).

A preference and a fraudulent preference are vitally different. The Bankruptcy Act prohibits a fraudulent preference only; and to constitute a fraudulent preference there must be present two circumstances, a preference in fact and an intention on the part of the debtor to prefer.

Section 31, subssecs. 1 and 2, of the Act, as enacted by 10 & 11 Geo. V. ch. 34, sec. 8, considered.

Long v. Hancock (1885), 12 Can. S.C.R. 532, *Sharp v. Jackson*, [1899] A.C. 419, and earlier English cases, applied and followed.

In this case, where an incorporated company, being in fact insolvent, had made in favour of its president (a creditor as guarantor) a mortgage on its plant, to secure him for moneys which he paid to the company and the company to its bankers in reduction of the

company's liability, and where within less than two months thereafter the company was adjudged bankrupt, it was *held*, upon the evidence, that the transaction was free from any taint of fraud; that the company entered into it for the sole object and in the *bonâ fide* expectation and belief that it would thereby be enabled to carry on its business successfully, and not with the view of preferring either the president or the bank to the company's other creditors; and actions, brought by the trustee in bankruptcy of the company's estate, to set aside the payment to the bank and the mortgage to the president, should be dismissed with costs.

Upon a motion, made after judgments had been pronounced by the trial Judge in the two actions in accordance with the above findings:—

Held, that the actions were not proceedings under the Bankruptcy Act, and the style of cause should not be changed so as to comply with Rule 7 of the Bankruptcy Rules.

2. That the trial Judge had no power to change a judgment after it had been formally entered, as was the case in one of the actions.
3. That, in the other action, in which judgment had not been entered, the trial Judge had power to alter the terms; but he declined to vary the disposition of costs made in the judgment as pronounced, holding that the defendants were entitled to unqualified vindication of their conduct, a material element of which was payment of their costs by the party responsible for the charges.
4. It was urged that the costs should have been made payable out of the estate, and that the plaintiff, the trustee in bankruptcy, should not be made personally liable unless for some special reason (Bankruptcy Rule 54 (3)); but, if there were assets of the estate wherewith to pay the defendants' costs, they should not be wasted in unwise and profitless litigation; and the fact that before the trial an order had been made directing what issue was to be tried made no difference in respect of the disposition of the costs.

THESE were two separate actions, brought by the same plaintiff, R. Easton Burns, the authorised trustee under the Bankruptcy Act of the Judge-Jones Milling Company Limited, against the Royal Bank of Canada and one Graham. In the action against the bank the plaintiff asked that a payment of \$40,000 made by the company to the bank should be declared a fraudulent and preferential payment and should be set aside, and in the action against Graham that a mortgage made by the company to Graham, securing \$40,000, be declared a fraudulent preference and set aside.

The actions were tried together by MULOCK, C.J.Ex., without a jury, at Belleville.

A. B. Cunningham, K.C., for the plaintiff.

H. J. Scott, K.C., and W. Carnew, K.C., for the defendant bank.

Malcolm Wright, for the defendant Graham.

January 31. MULOCK, C.J.Ex.:—Much of the evidence being common to both cases, it was agreed by counsel that the

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whole evidence in each case should be taken on one examination of witnesses, and be applicable as far as possible to the respective cases, and this course was pursued.

The impeached mortgage bears date the 30th November, 1920, and purports to be security to the defendant Graham for \$40,000 lent to the company; but, in the negotiations which led up to this mortgage-transaction, it had been agreed between the company and the defendant Graham that the \$40,000, when paid by Graham to the company, should forthwith be paid over to the bank on account of an indebtedness of the company to the bank. This agreement was carried out, Graham paying to the company the \$40,000 by his cheques, which were immediately deposited by the company to its credit in the bank. The last cheque was dated the 7th December, 1920, was for \$17,295, and was deposited on the 9th December.

About the middle of December, Greenlees Limited, a creditor of the company for the sum of about \$500, instituted an action against the company, whereupon the company called a meeting of its creditors for the 20th December. At this meeting, the financial position of the company was considered and an adjournment was had for 4 weeks in order to afford the company the opportunity of making financial arrangements for continuing in business; but at the adjourned meeting held on the 17th January, 1921, it was learned that the company had been unsuccessful in making such arrangements, whereupon it was unanimously decided to put the company into bankruptcy. The result of this decision was that on the 22nd January, 1921, the Court adjudged the company bankrupt.

For the determination of the two issues, namely, the validity of the payment of \$40,000 and the validity of the mortgage, it is expedient to consider the affairs of the company from its beginning, and the following is a review thereof as disclosed by the evidence.

The company was incorporated in January, 1922, with power to carry on a milling business, and shortly thereafter was organised, the defendant Graham being chosen president and George B. Jones general manager, and these two officers continued to hold their respective positions until the company's bankruptcy. At this date its paid-up capital was nominally \$110,000, but it is difficult to ascertain from the evidence what proportion represented actual cash.

From the evidence of George B. Jones it appears that at its inception the paid-up capital stock amounted to \$50,000, of which Jones held \$25,000, paid for partly with cash and partly

with machinery, and the defendant Graham, for himself and other members of his family, held \$25,000 stock, paid for with \$20,000 cash and a building valued at \$5,000, conveyed to the company. Shortly thereafter Jones expressed to the company his opinion that the properties acquired by the company were worth from \$75,000 to \$80,000, and suggested that the capital stock of \$50,000 be regarded as \$70,000. This suggestion was acted upon, and thus the paid-up stock came to be treated in the company's books as amounting to \$70,000.

In September, 1920, Jones subscribed for \$20,000 additional stock in the company at par, and paid therefor in cash, namely, \$20,000, and the defendant Graham subscribed for \$20,000 additional stock, and paid therefor by conveying to the company certain real and personal property. No question, I think, can arise as to whether the property thus conveyed by the defendant Graham to the company was not worth the full amount of \$20,000, for Jones, who paid for his stock in cash, was quite satisfied with the price of the defendant's property. Thus the apparently paid-up capital of the company became \$110,000.

On its organisation the company had arranged with the defendant bank for a line of credit to the extent of \$150,000, to be secured by warehouse receipts under sec. 88 of the Bank Act, and by the joint and several guarantees of the defendant R. J. Graham, George B. Jones, and Edgar Judge; and, by written guarantee bearing date the 14th January, 1920, the said Graham, Jones, and Judge became jointly and severally liable to the bank, to the extent of \$150,000, in respect of any indebtedness of the company, and this guarantee was in full force when the company, on the 30th November, 1920, executed the impeached mortgage in favour of the defendant Graham to secure the loan by him to the company of \$40,000, to be paid by the company, in reduction of its indebtedness to the bank.

The company's bank-account was carried at the bank's branch office at Belleville, the manager there being W. A. Parker. In November, 1920, the company owed the bank \$113,000 for loans collaterally secured by warehouse receipts; and Mr. Parker, being of opinion that the company's assets were insufficient to cover the \$113,000, discussed the company's affairs with the manager, George B. Jones, and the president, Graham, when it was decided by Parker and Graham (as Parker expressed it) "that an audit should be made by a chartered accountant to learn the true condition of the company." Accordingly, Mr. Short was instructed to make an audit, which he

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did, and the following is a copy of the company's assets and liabilities on the 31st October, 1920, as found and reported upon by Mr. Short:—

The Judge-Jones Milling Co. Limited.
Balance Sheet as at 31st October, 1920.

Assets.

Current Assets.

Cash	51.94	
Victory bonds (\$3,000 1934 issue)	2,760.00	
Accounts and bills receivable	49,132.51	
Judge Grain Company	331.18	
Stock-in-trade	94,912.72	
	— — — — —	147,238.35
Investments		200.00
Land, buildings, and equipment		86,198.18
Goodwill		20,000.00
Trademarks		30.00
		— — — — —
		253,666.53

Liabilities.

Royal Bank of Canada	161,484.87
Accounts and bills payable	46,645.89
Reserve for loss on outstanding orders	32,325.07
	— — — — —
	\$240,435.83

Surplus.

Capital stock	110,000.00	
Less loss for year ending 31st October, 1920 (as per profit and loss account)	96,789.30	13,210.70
	— — — — —	— — — — —
		\$253,666.53

The following are the items as shewn by the auditor which make the company's indebtedness to the bank:—

Amount of indebtedness on loans for which the bank held warehouse receipts	113,000.00
Trade bills in discount	34,801.58
Liability for draft drawn by the company on Gordon Grant & Company, without per- mission, against stock on consignment	13,126.52
Overdraft on current account	556.57
	— — — — —

Making in all \$161,484.87

Although the auditor's report was not in Parker's hands until about the 1st December, Parker, prior to that date, had learned from Short in a general way the result of the auditor's investigations; and, in consequence, on the 26th November, 1920, made a written demand on the sureties calling for a substantial reduction in the company's indebtedness to the bank; and, in conversation with the defendant and Jones, Parker verbally stated that he required "a payment of \$40,000."

At this time Parker was aware that the company's plant was its only asset wherewith it could raise funds. The company, learning of the bank's demand for payment by the guarantors, offered to give the bank a mortgage on its plant, but this the bank declined, and then it was arranged between Graham and the company that the company would give to Graham a mortgage on its plant for \$40,000, which money was to be paid through the company to the bank in reduction of the company's indebtedness, and this arrangement was carried out. Parker was aware of this arrangement; and, in order to enable Graham to raise the full amount of the \$40,000, lent for the bank to Graham \$17,295, which money Graham paid to the company, and the company paid to the bank on the 9th December, 1920.

The plaintiff's contention is that Graham was a creditor of the company because of his guarantee (the Bankruptcy Act, sec. 31 (1), as amended by 10 & 11 Geo. V. ch. 34, sec. 8, subsec. 3), and that the effect of the mortgage, if allowed to stand, would be to give him a preference over the other creditors to the extent of \$40,000 paid in reduction of the company's indebtedness and of his liability as such guarantor.

Subsection 1 of sec. 31 of the Bankruptcy Act, as amended by 10 & 11 Geo. V. ch. 34, sec. 8, declares that: "Every conveyance or transfer of property . . . every payment made . . . by any insolvent person in favour of any creditor . . . with a view of giving such creditor a preference over the other creditors shall, if the person making . . . the same is adjudged bankrupt . . . within three months after the date of making . . . the same . . . be deemed fraudulent and void as against the trustee in the bankruptcy . . ." Subsection 2 of sec. 31, as amended, declares that: "If any such conveyance, transfer, payment . . . has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *primâ facie* to have been made . . . with such view as aforesaid, whether or not it was made voluntarily or under pressure, and evidence of pressure shall not be receivable or avail to support such transaction."

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The first question to determine is whether the company was insolvent when the impeached mortgage and payment were made. By para. (t) of sec. 2 of the Bankruptcy Act, it is declared that "insolvent person" and "insolvent" "include a person, whether or not he has done or suffered an act of bankruptcy, (i) who is for any reason unable to meet his obligations as they respectively become due, or (ii) who has ceased paying his current obligations in the ordinary course of business, or (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient, to enable payment of all his obligations, due and accruing due, thereout."

I find that, when the mortgage transaction was entered into and the \$40,000 was paid to the bank, the company was in fact unable to meet its obligations as they respectively became due. I think the evidence shews that the company was in fact insolvent on the 30th November, 1920.

At the trial leave was given to the plaintiff to amend his statement of claim in the action against Graham by making allegations to the effect that the mortgage-transaction, including the payment of the \$40,000, was a fraudulent preference within the meaning of sec. 31 of the Bankruptcy Act; and I assume that such amendment has been made. If this mortgage-transaction was merely a loan by Graham to the company on the security of the mortgage, the company being left free to make such use of the mortgage-money as it thought proper, and if Graham, the mortgagee, was in no way responsible for the payment over of the money to the bank, I fail to see how the mortgage could be successfully attacked. To set it aside as a preference, it is necessary to shew that it was made with a view of giving a fraudulent preference to Graham or to the bank or to both of them.

The evidence is clear that the loan by Graham was not made for the purposes of the company generally, but for one purpose only, namely, for payment through the company to the bank in reduction of the company's indebtedness, for which indebtedness Graham, as surety, was liable. It appears from the company's minutes that the board was aware of the bank's demand upon the sureties, and that the amount required of them was \$40,000; that the company had no assets whereby it could raise that amount except the property mortgaged to Graham; and that the board authorised the making of the mortgage to Graham for the single purpose of obtaining from him \$40,000 to be so paid to the bank. It further appears that Parker,

the bank-manager, was aware of this plan for raising the money to be paid to the bank, and assisted in its being carried out by lending to Graham a portion of the mortgage-money. By the 9th December the whole \$40,000 lent by Graham to the company had been paid to the bank in reduction of the company's indebtedness, whereby Graham's liability as surety became also reduced by \$40,000. As surety to the bank, Graham, within the meaning of the Act, was a creditor of the company. The company was insolvent when it made the mortgage, and within 3 months thereafter was adjudged bankrupt. Was this mortgage made to him, or the payment by the company to the bank made, with a view of giving him, or the bank, a preference over the company's other creditors? Section 31 of the Bankruptcy Act, as amended by 10 & 11 Geo. V. ch. 34, sec. 8, subsec. 2, has settled the much-debated question whether a payment, etc., which has the effect of preferring one creditor is *per se* invalid, or whether in order to secure its invalidation it is necessary to shew that it was made with the view of preferring, i.e., that, although the effect is *prima facie* evidence of an intention to prefer, such intention is rebuttable.

The mortgage-transaction, and in this expression I include the payment of the money by the company to the bank, reduced the company's indebtedness to the bank and the liability of the defendant Graham, the effect of which was, to give the bank and the defendant Graham a preference over the company's other creditors, and thus cast upon them the onus of rebutting the *prima facie* presumption of an intention to prefer. The issue thus raised is one of fact, and I will now deal with the evidence relied upon in support of and against the transaction.

[The learned Chief Justice abstracted the testimony of George B. Jones, a director and general manager of the company; of Jamieson Bowen, vice-president of the company and holder of a considerable amount of stock therein; of the defendant R. J. Graham; of George K. Graham, another director; of Mr. Short, the auditor; of Mr. Parker, the bank-manager; and continued:]

Edgar Judge, one of the company's directors, had died before the trial, but all the surviving directors, namely, George B. Jones, Jamieson Bowen, R. J. Graham, George K. Graham, gave evidence at the trial.

The effect of the mortgage-transaction having been, I think, to raise a *prima facie* presumption that it was made with a view to preferring Graham or the bank over the company's other creditors, the question is, whether that presumption has been rebutted. I see no reason for disbelieving the evidence of any

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of the directors, George B. Jones, Jamieson Bowen, R. J. Graham, and George K. Graham; on the contrary, I am of the opinion that they each gave truthful and reliable evidence. Their confidence in the company's possibilities was not without reasonable foundation. Mr. Jones, the manager, an experienced miller, reliable and intelligent, had embarked his whole fortune in the enterprise; he had built up for the company a profitable local trade; the flour was of a brand that commanded a good price, which largely took care of any loss because of the fall in the price of wheat; and he honestly believed that the company would be able to extricate itself from possible loss in the cost of wheat, both delivered and to be delivered. Further, he had been led to expect a rise in the price of wheat, hence his optimism which he impressed upon his co-directors, men having no practical experience in the milling or grain business. As he gave his evidence, I formed the opinion that he was an upright, intelligent man, and I can readily understand his co-directors, more or less intimately associated with him in the conduct of the company's business, honestly accepting his views as to the company's possible promising future and being guided by him in their direction of the company's affairs.

The evidence rebuts the *primâ facie* presumption that the company intended to prefer either Graham or the bank to its other creditors. The test is, was the operative and effectual object of the company to give both or either of the defendants a preference? The language of the statute is clear. In order to the invalidation of the impeached transaction it must appear to the Court that it was entered into with a "view of giving such creditor a preference over the other creditors." The intention of the company alone is to be considered. In seeking to ascertain what was such intention, it is proper to inquire into the attendant circumstances, but only for the purpose of enabling the Court to determine the crucial question, "What was the company's view?" A preference and a fraudulent preference are vitally different. The statute prohibits a fraudulent preference only, not what may in fact be a preference, but which lacks the element of intention on the part of the debtor to give to the preferred creditor a preference over the other creditors. The Bankruptcy Act does not apply to a preference of the latter nature. In other words, to constitute a fraudulent preference there must be present two circumstances, a preference in fact and an intention on the part of the debtor to prefer: *Ex p. Blackburn* (1871), L.R. 12 Eq. 358, 365; *Ex p. Griffiths* (1883), 23 Ch. D. 69; *Ex p. Hill* (1883), 23 Ch. D.

695; *Long v. Hancock* (1885), 12 Can. S.C.R. 532; *Ex p. Taylor* (1886), 18 Q.B.D. 295; *New Prance & Garrard's Trustee v. Hunting*, [1897] 2 Q.B. 19; *Sharp v. Jackson*, [1899] A.C. 419.

The financial history of the company from its inception until its bankruptcy, as unfolded before me in the early part of the trial, caused me to regard the mortgage-transaction with grave suspicion, but the evidence in support of it imparted to it a different complexion. Nevertheless, the circumstances that the company, being in fact, at the time, insolvent, had made the mortgage to its president, a creditor, and had, within less than 2 months, become bankrupt, demanded the closest scrutiny of the evidence. After having given to it the most careful consideration, I have reached the conclusion that the mortgage-transaction was free from any taint of fraud; that the company entered into it for the sole object and in the *bonâ fide* expectation and belief of being thereby enabled to carry on its business successfully, and not with the view of preferring either the defendant Graham or the defendant bank to the company's other creditors.

For these reasons, both actions fail and should be dismissed with costs.

Some time after the delivery of judgment as above, a creditor of the Judge-Jones Milling Company Limited made a motion before MULOCK, C.J.Ex., for the purposes set out below.

J. J. Macleennan, for the applicant.

J. W. Pickup, for the defendant Graham.

May 23. MULOCK, C. J. Ex.:—This is a motion on behalf of a creditor of the bankrupt company for an order amending the style of cause by intituling the same as required by Rule 7* of the Bankruptcy Rules; and also for a re-consideration of the disposition which I made of the costs of the actions.

Both of the actions grew out of the same transaction, and were tried together before me at the Belleville sittings, and were dismissed with costs. The formal judgment has been entered in the action of *Burns v. Royal Bank of Canada*, and therefore I have no power to change it. Formal judgment has not been entered in the case of *Burns v. Graham*, and I

*7. Every proceeding in Court under the Act shall be . . . intituled in the name of the Court in which it is taken "In Bankruptcy," and then in the matter to which it relates. . . .

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am therefore still seized of that case and have power to deal with the motion on its merits.

The facts which I consider material to the determination of that motion are as follows. The plaintiff, as authorised trustee in bankruptcy of the Judge-Jones Milling Company, sought to have certain alleged fraudulent preferences set aside. The actions were each begun by writ of summons, followed by statements of claim and defence and joinders of issue, and what were tried were the issues raised by these pleadings. The plaintiff's counsel closed each case without shewing or suggesting any authority to the plaintiff from the inspectors in bankruptcy to institute these actions. In the course of the defence, the plaintiff on cross-examination was asked by what authority he brought the actions, and he said by the written authority of the inspectors, whereupon his counsel undertook to prove such authority, but did not do so; and, when considering the question of costs, it not appearing that the actions were brought by virtue of any provisions of the Bankruptcy Act, I did not assign reasons, as contemplated by Rule 54 (3)[†] of that Act, for my disposition of the costs, but dealt with them as in ordinary actions.

The moving creditor now invokes the provisions of Rule 54 (3), and states that before the trial an order had been made in Chambers directing what issue was to be tried, and that therefore the actions should be considered as brought in accordance with the provisions of the Act. This was the first intimation I had of such an order, but its existence does not cause me to change my disposition of the costs. The circumstances connected with the giving of the impeached preferences were suspicious; the plaintiff, however, apparently took no steps to ascertain whether such suspicion was well-founded, but launched these actions, charging fraud against the defendants. The charges were baseless, and the defendants were entitled to unqualified vindication of their conduct, a material element of which, in my opinion, is payment of their costs by the party responsible for the charges.

On the motion it was urged that the costs should have been made payable out of the estate; but from the evidence I doubt if there are assets wherewith to pay the defendants' costs.

[†]54. (3) Where an action is brought by or against an authorised trustee as representing the estate of the debtor, or where an authorised trustee is made a party to a cause or matter, on his application or on the application of any other party thereto, he shall not be personally liable for costs unless the Judge before whom the action, cause or matter is tried for some special reason otherwise directs.

Even if there are, they should not be wasted in unwise and profitless litigation, as too often happened under the repealed Insolvent Act. If the estate were not good for the costs, and the plaintiff were not required to pay them, the defendants would be penalised in defending their rights and their honour. I therefore see no reason for changing my direction as to costs.

With reference to the other branch of the motion, namely, to change the style of cause, the proceedings were not begun under the Bankruptcy Act, and the style of cause should not be changed.

[On the 2nd October, 1922, appeals from the judgments of MULOCK, C. J. Ex., in the two actions, were heard by the First Divisional Court of the Appellate Division, and were dismissed with costs, as regards the dismissal of the actions. The question of the costs of the actions was reserved for further consideration.]

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Criminal Law—Obstructing Constables in Execution of Duty—Criminal Code, sec. 169—Acquittal of Defendant by Police Magistrate—Case Stated by Magistrate under sec. 761—Jurisdiction of Court—Application of Part XV. of Code—Constables Searching Unlicensed Premises for Intoxicating Liquor—Seizure of Liquor—Demand of Names of Persons—Advice of Defendant to Refuse to Give Names—Ontario Temperance Act, secs. 66, 68 (2)—“Next two Preceding Sections”—Effect of Enactment of New Section—Interpolation—Penalty for Refusal to Give Names—Prohibition—“May”—“Wilful Obstruction”—“Counselling”—Sec. 69 (d) of Code—Case Remitted to Magistrate under sec. 765.

Part XV. of the Criminal Code applies to a prosecution under sec. 169; a police magistrate trying an accused person for an offence against that section may reserve and state a case for the Supreme Court of Ontario, under sec. 761, and a Judge of that Court may hear and determine the case in Chambers.

Rex v. West (1915), 35 O.L.R. 95, followed.

Provincial constables, acting under the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50, entered a standard hotel and searched it for intoxicating liquor kept contrary to the Act. In a certain room they found 8 men and two bottles of intoxicating liquor, which they seized. The defendant entered the room, and was told that there were provincial constables present. The constables proceeded to ascertain the names of the men in the room. The defendant advised the men not to give their real names, and they refused to do so. The defendant asked to see the constables' warrant, and was told that a warrant was unnecessary. He called them “skunks,” and said that they should have been thrown out of the window when they entered the room, and if he had been there he would have done it:—*Held*, that sec. 66 of the Act authorised the constables' entry into this

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“place of public entertainment,” and also their search; and sec. 68(2) authorised their demand of the names of the men, who were persons found in unlicensed premises where intoxicating liquor was seized.

Section 68 (2) gives this authority only when the officer is acting “in pursuance of the next two preceding sections or either of them:” that includes sec. 66, although sec. 67*a*. was introduced into the Act in 1920 by 10 & 11 Geo. V. ch. 78, sec. 10: the direction of the Legislature was not that sec. 67*a*. should be interpolated, but that the Act should be amended by adding it.

The provision of sec. 68 (2) that the officers “*may* demand the names,” while *ex facie* permissive, indicates, in the connection in which it is used, an obligatory duty.

It being within the realm of legal duty for the officers to demand the names, it became the legal duty of those asked to furnish the names to do so. If they refused, they incurred a penalty under sec. 68; and a penalty imports a prohibition.

The advice of the defendant that the men should refuse to give their names was a wilful obstruction of the officers in the execution of their duty, within the meaning of sec. 169, which provides that every one who wilfully obstructs any peace officer in the execution of his duty is guilty of an offence.

The obstruction need not be physical nor need it be effective.

Review of the authorities.

Seemle, there was an offence under sec. 69 (*d*) of the Code, for the defendant counselled and wilfully encouraged the men to commit the offence of refusing to give their names, and so was a party to and guilty of the offence.

The defendant was charged before a police magistrate and acquitted, but the magistrate reserved and stated a case for the consideration of the Court, upon which it was *held*, that the case had not been fully tried, and should be remitted to the magistrate, under sec. 76 of the Code, with the above opinion of the Court, and a direction to try the case and adjudicate thereon in accordance with that opinion.

CASE reserved and stated by one of the Police Magistrates for the City of Toronto, before whom the defendant was tried on a charge of obstructing constables in the execution of their duty, contrary to the Criminal Code, sec. 169. The magistrate acquitted the defendant without calling on the defence; and, on the application of the Crown, reserved a case under sec. 761 of the Criminal Code.

January 27. The case was heard by RIDDELL, J., in Chambers.

Edward Bayly, K.C., for the Crown.

R. H. Greer, K.C., for the defendant.

February 1. RIDDELL, J.:—This case has been ably and exhaustively argued upon both sides and presents several questions of great interest from a legal point of view. Both parties desire me to dispose of it: it is stated that there is no intention to proceed further against the defendant, and that what

is desired is a decision on pure law—"dry law"—though this is a whisky case. It is desired to have a declaration of the law for the guidance of magistrates in the future.

The defendant was tried before Mr. J. E. Jones, Police Magistrate at Toronto, on a charge of obstructing constables "in the execution of their duty, contrary to the Criminal Code, sec. 169"—the Police Magistrate acquitted without calling on the defence; but, on the application of the Crown, reserved a case for the Supreme Court under sec. 761 of the Criminal Code.

It is necessary first to dispose of the objection that the Court has no jurisdiction in the premises.

The argument is that the offence charged comes under sec. 773 (*e*) of the Code; that this section is in Part XVI.; that, except as to particular offences specially referred to in secs. 797, 798, the provisions of Part XV. are not applicable to the offences in Part XVI.; that sec. 773 (*e*) does not deal with any of such particular offences; and that, consequently, the provisions of Part XV. (sec. 761 *et seq.*) as to a case stated do not apply.

The distinction between the "Summary Convictions" of Part XV. and the "Summary Trial" of Part XVI. is well-known; and, if the present were a trial under any section of Part XVI., the objection would be fatal.

But the Code by sec. 169 provides that "every one who . . . wilfully obstructs any peace officer in the execution of his duty . . . is guilty of an offence punishable on indictment or on summary conviction" and is liable, "on summary conviction before two Justices, to 6 months' imprisonment. . . ."

The information was laid and the trial was had under this section 169. There has been a difference of opinion as to whether one charged under this section could be summarily tried without his consent.

In *Regina v. Crossen* (1899), 3 Can. Crim. Cas. 152, it was held by the Manitoba Court that the accused could not be tried without his consent, on the ground that sec. 783 (*e*) of the Criminal Code of 1892 (the present 773 (*e*)) was the controlling section, and that section did not authorise such a procedure. This decision came up for review in British Columbia in *Rex v. Nelson* (1901), 4 Can. Crim. Cas. 461, 8 B.C.R. 110. Mr. Justice Drake in a careful judgment discusses the Manitoba case, and gives what to my mind are sufficient reasons why it should not be followed. The case in our Appellate Division, *Rex v. West* (1915), 35 O.L.R. 95, is conclusive so far as any

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Ontario Court is concerned—that case decided that the Crown may elect to proceed under sec. 169 rather than sec. 773 (e): and, if that course is pursued, Part XV. applies.

I must, therefore, overrule the preliminary objection.

Then as to the merits. The evidence before the Court is that for the prosecution—from this, the facts seem to be as follows.

On the 2nd December, 1921, J. R. Smythe and F. B. Creasy, provincial constables, with G. Fielding, a special officer under the Ontario Temperance Act, went to the Mansion House at Sutton, a standard hotel, at which meals and refreshments are served. Fielding told Graham, the proprietor of the hotel, that he wished to search the hotel for liquor kept contrary to the Ontario Temperance Act; Graham consented; the three officers went to room 11 on the second floor of the hotel, and found there eight men sitting and standing around the room, and two bottles of liquor underneath a small table in the room—there were also glasses. Fielding seized the bottles, one of wine, the other of whisky, and passed them one to each constable. He continued searching the room—the defendant tried to enter the room, and finally succeeded.

So far the facts are preliminary, and not of great importance.

When the defendant entered the room, he asked what was going on in the room, and he was answered, “There are provincial police in the room.” The constable Creasy said to his mate, Smythe, “Take the names of the men in the room,” and the defendant then said: “Don’t give your names to these skunks—give them Smith, Jones, or any old thing.” Smythe asked a man in the room for his name, and was refused—the two officers “asked every one in the room their name,” and they refused, they did not say why. One man, who seems to have been known to Fielding, gave his name as Smith, his name being T. A. The constables, on the defendant asking their authority for entering the room, shewed their provincial police badges, and the defendant said, “Any fool could have a badge like that.” He asked if they had a warrant, and was informed that no warrant was necessary, that they were from provincial police headquarters, “General Elliott’s men”—the defendant then said that he did not think General Elliott sent them there; that they should have been thrown out of the window when they entered the room, and if he had been there he would have done it.

So far the story is from Fielding—Smythe says that when the defendant said, “Don’t give these skunks your names—

give them Smith, Jones, or any old thing"—"there was a chorus came from the crowd when Mr. L. (the defendant) said that, said they would refuse to give their names. Constable Creasy spoke up and said, 'Well, you all refuse to give your names?' and the chorus came back from the crowd, 'Yes'—all refused to give their names, they were going to abide by what Mr. L. said." The evidence of Creasy does not add anything of value.

On the close of the case for the Crown, the learned Police Magistrate did not call on the defence; he said that the Act did not make it an offence "for somebody to advise somebody else not to give his name." He dismissed the charge upon this ground.

In the case stated under sec. 761, the learned magistrate intimates that the dismissal was because he "was of opinion that anything the defendant may have said did not in fact influence any of the persons present to do any act that obstructed the constables in the execution of their duty."

Of course that is not the charge which was tried—the defendant was charged with himself obstructing, not with influencing others to do an act which did obstruct, the constables. I must, however, consider the statement in the case as giving the magistrate's reason for the dismissal.

In my view, the magistrate is wrong.

The officers were acting under the provisions of the Ontario Temperance Act (1916), 6 Geo. V. ch. 50, and amendments. Section 66 authorises their entry into this "place of public entertainment," and also their search; while sec. 68 (2) provides that they "may demand the name . . . of any person found therein," when they seize liquor in any unlicensed premises.

It is argued that sec. 68 (2) gives this authority only when the officer is acting "in pursuance of the next two preceding sections or either of them," and that the Legislature by the Act (1920) 10 & 11 Geo. V. ch. 78, sec. 10, has introduced a section 67*a.*, and thereby removed sec. 66 from the category, "the next two preceding sections." But the Legislature did not direct that the new section 67*a.* should be interpolated; the direction was that the Act should be amended by adding it. The fact that in one edition of the department compilation the amendment is printed between secs. 67 and 68 is of no more importance than that in another edition (now before me) it is printed as a mere subsection (*a*) without number. The legislation is the legislation of the Legislature, not that of a departmental officer, of a department, or of the Government itself—no

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act of an officer can affect the rights and duties of the subject. See *Hirshman v. Beal* (1916), 38 O.L.R. 40, at pp. 45, 46, 50.

To interpret a statute, words are taken in the sense which they bore at the time when the statute was passed, and they are not affected by matter subsequent: Craies' *Hardcastle on Statutes*, 2nd ed. (1911), pp. 87 *sqq.*, and cases quoted.

The statute provides that the officers "may demand the name . . ."—while it is true that the word "may" is *ex facie* permissive, it is also true that, in such a connection, it indicates an obligatory duty imposed upon these officers of the law. All the English cases from *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214, down to 1903, are collected in Stroud's *Judicial Dictionary*, *sub voce* "May"—and I do no more than refer to that valuable book.

It was within the realm of legal duty for the officers to demand the names; it thereupon became the legal duty of those asked to furnish the names. If they refuse to do so, they incur a penalty under sec. 68; that a penalty imports a prohibition is a principle almost as old as the common law itself. It was, perhaps, first articulately expressed by Holt, C. J., in *Bartlett v. Vinor* (1693), Carthew 252—"a penalty implies a prohibition, tho' there are no prohibitory words in the statute." See *Cope v. Rowlands* (1836), 2 M. & W. 149, at pp. 157 *sqq.*, per Parke, B. It may be noted that our Code does not forbid murder—all that it does is to provide (sec. 263) that "every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death."

It being the duty of the officers to demand and of the men in room 11 to supply, when demanded, the names, the sole question is, whether advice by the defendant to refuse to give the names—or, what amounts to the same thing, to give false names—is an obstruction of the officers in the execution of their duty.

It is, of course, elementary that it is the moral duty of every citizen to do his part in having the law obeyed—no one has any moral right to oppose the operation of any law, however much he may disapprove of it—there is a constitutional method of repealing obnoxious laws; but, so long as a law is on the statute-book, it must be obeyed by every law-abiding man.

This consideration does not at all conclude the case—there are many moral duties of which the law takes no cognisance, and many acts there are to be deplored, perhaps reprobated, which cannot be punished.

To come to the facts of this particular case—it is stated that

the defendant is a lawyer—Fielding on cross-examination says that he knew he was a lawyer, but he does not give the grounds of what could only be a belief, not knowledge; and the magistrate, Crown counsel, and the defendant's counsel speak of him as such—the magistrate saying: "Mr. L. may, unintentionally perhaps, have encouraged his clients by bad advice to commit an offence themselves, but he, himself, I take it, has not . . . committed an offence." There is no legal evidence here that he is a lawyer; but, if we assume that such is the fact, he is not advantaged—nor would he profit if the persons to whom he gave the advice were his clients, as to which there is no semblance of evidence. A lawyer has no more right to advise his clients to break the law than a layman so to advise another layman. Moreover, if from the manner in which the evidence of Fielding was brought out, it should be taken as a fact as against the defendant that he is a lawyer, it seems to me that it would tell against him, as advice on a legal matter from a lawyer would naturally be expected to have more effect than advice from a layman.

Whether the defendant, by giving advice to those whose legal duty it is to give their names, is or can be guilty under sec. 169, depends upon the meaning of the words "wilfully obstructs" in that section. That the acts of the defendant were wilful cannot be doubted, and we have only to interpret the word "obstruct."

Too much stress should not be laid on the cases of obstructing engines, carriages, etc., on a railway, as these are not wholly cognate matters—such are *Regina v. Hadfield* (1870), L.R. 1 C.C.R. 253; *Regina v. Hardy* (1871), L.R. 1 C.C.R. 273—these cases shew, however, that even in railway cases the obstruction need not be a physical obstruction. "The gist of the offence to my mind lies in the intention with which the thing is done:" per Darling, J., in *Betts v. Stevens*, [1910] 1 K.B. 1, at p. 8.

While "obstruct" does imply opposition, it may be without active force, and the word "does not imply that the opposition was in the end effective:" *United States v. Williams* (U.S.), 28 Fed. Cas. 631, 633, quoted in "Words and Phrases," vol. 6, p. 4890. The criterion apparently adopted in this case by the learned magistrate, that there is no obstruction if what is complained of does not in fact prevent the officers from doing their duty, is not the true one.

That the obstruction need not be physical is shewn by the case of *Betts v. Stevens*, [1910] 1 K.B. 1—the opinion of Rid-

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ley, J., in *Bastable v. Little*, [1907] 1 K.B. 59, at p. 62, is not law. As our Court of Queen's Bench said in *Regina v. Plummer* (1870), 30 U.C.R. 41, at p. 42, "A person may be obstructed in the performance of his duty, and I think that threats may constitute an obstruction."

Obstruction then being not necessarily physical or effective, I think anything is obstructing an officer in the execution of his duty, the natural effect of which would or might be to prevent him from obtaining evidence concerning an offence, real or supposed, against the law, which it is his duty to investigate, or concerning which it is his duty to seek or obtain evidence (of course, this is not a definition, as it is far from being exhaustive). The fact that the officer might have proceeded against the recalcitrants here under the provisions of sec. 68 (3) of the Ontario Temperance Act is of no consequence: *Betts v. Stevens*, [1910] 1 K.B. at p. 7.

In my opinion, the natural effect of the defendant's words, especially if he is a lawyer, and more especially if, as has been stated, he is a member of the Legislature, and a man of great influence in that community, would be to prevent the names being given to the officers, and thereby to obstruct the officers in the execution of their duty.

The violence of the language is an element to be considered by the magistrate, though I cannot understand why an officer performing a statutory duty should be spoken of and to with an offensive epithet—no doubt the excitement of the time will account for, if it does not excuse, the language used—but surely there can be no more reason for insulting an officer performing this duty than any other.

There is another consideration which seems to have been wholly overlooked.

Section 69 (d) of the Code expressly provides that "every one is a party to and guilty of an offence who . . . counsels . . . any person to commit the offence."

This is a technical but not a substantial variation of the common law in some cases. At the common law, one who is not present at the commission of a felony, but who procures, counsels, commands, or abets another to commit the felony, is an accessory before the fact: 1 Hale P.C. 615; Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 116. If he is present so counselling, etc., but does not personally do the felonious act, he is a principal in the second degree. In misdemeanours, there is no distinction between the principals and accessories: *Regina v. Burton* (1875), 13 Cox. C.C. 71; *DuCros v. Lam-*

bourne, [1907] 1 K.B. 40; *Rex v. DeMarny*, [1907] 1 K.B. 388.

Our Code makes no distinction between accessories before the fact and principals; and secs. 69 and 70 are clear.

Mere passive presence when an offence is committed is not necessarily a participation in it, but "wilfully encouraging" it is: *Regina v. Coney* (1882), 8 Q.B.D. 534, 51 L.J.M.C. 66—see per Hawkins, J., at p. 78; *Howells v. Wynne* (1863), 32 L.J.M. C. 241, 15 C.B.N.S. 3; *Barratt v. Burden* (1893), 63 L.J.M.C. 33.

That the defendant here counselled and "wilfully encouraged" the offence of refusing to give names is clear, so far as the evidence has gone—he, therefore, would be guilty of the offence itself on this evidence.

It can scarcely be argued that the refusal of those present to give their names was not obstructing the officers in the execution of their duty—and on this evidence the defendant was guilty of that offence.

The statement of the accused as to throwing the officers out of the window might justify a finding of obstruction, on the principle of the remarks of Wilson, J., in *Regina v. Plummer*, already quoted—but the magistrate might prefer to look upon the language as Bole, Co. C.J., did on that employed by the defendant in *Rex v. Cook* (1906), 11 Can. Crim. Cas. 32, at p. 33; the Judge considered the defendant an "individual who evidently regards the police with disfavour and makes no secret of his opinions on the subject." In other respects, the defendant can get little comfort from that case, as the learned Judge expressly excepts from protection those who "are inciting others to break the law" (p. 33).

Whether the defendant could set up ignorance of the status of the officers, on the principle of such cases as *Rex v. Smith* (1921), ante 324, 67 D.L.R. 273, I do not decide. Probably such a defence would not be set up; at all events, there is no decision yet on the fact, and the matter should remain open. If and when the matter comes to be considered, such cases as *Regina v. Forbes* (1865), 10 Cox C.C. 362, will receive attention.

The case has not been fully tried: under sec. 765 of the Code, I remit the matter to the magistrate with the opinion of the Court as above set out, and a direction to try the case and adjudicate thereon in accordance with the above opinion.

If I have power over the costs, I direct that the defendant pay the costs of the case stated.

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Banks and Banking—Security Taken by Bank—Lease of Chattels—Invalidity—Powers of Bank—Bank Act, 3 & 4 Geo. V. ch. 9, secs. 76 (b), (c), (d), 88, 141, 146 (a)—Interpleader.

Certain goods seized by a sheriff under execution were claimed by a bank under a lease in writing and under seal, made by the execution debtors to the bank as security for advances:—

Held, that the lease was invalid, the bank not having the power, under the Bank Act, 3 & 4 Geo. V. ch. 9, to take a lease of chattels as security; and an interpleader issue between the bank and the execution creditor was found in favour of the latter.

Sections 76 (b), (c), (d), 88, 141, and 146 (a), of the Act, considered.

AN interpleader issue, tried by MOWAT, J., without a jury, at Stratford.

R. S. Robertson, K.C., for the plaintiff bank.

A. E. Parkinson, for the defendant.

February 7. MOWAT, J.:—The property in dispute consists of two Cleveland tractors seized by the Sheriff of Perth under a writ of *fiery facias* issued by the defendant, as execution creditor, against A. L. McCredie and A. L. McCredie Limited.

The Bank of Montreal claims ownership, at the time of seizure, under a “lease,” in writing and under seal, of the tractors from A. L. McCredie and Dominion Flax Limited; and a novel and interesting point is thus presented—whether a bank, under such a form of transfer, can acquire a security and a preference as against other creditors.

Ordinarily a bank is confined to the powers given by the Bank Act as regards its powers to obtain security for its loans and advances, and up to the present time no case has arisen where a lease of personal property has been invoked as a security.

The Bank Act, under the power “Banking and Commerce,” made invasions upon the rights of the Provinces under the power “Property and Civil Rights,” and contentions regarding these two powers have been settled by a series of cases in which the respective rights of Dominion and Provinces have been sharply contested: the Bank Act must be viewed in the light of these contests and judicial interpretations. An element which cannot well be ignored also is the fact that the Bank Act has been subject to periodic revision to adapt it to the commercial requirements of the Dominion as they have developed. It is a matter of common knowledge that, as a new Bank Act is introduced decennially, it has been referred to a

special parliamentary committee where the banks, represented by powerful and influential representatives and by forceful counsel, contest sharply with those who constitute themselves representatives of the "people" as to whether further privileges and methods of security shall be granted. The last result of such a contest is found in the Bank Act, 3 & 4 Geo. V. ch. 9, which does not extend in any material way the powers of taking security formerly possessed, namely, by warehouse receipt or bill of lading, or the acquirement of the product of agriculture, and other natural resources, and of manufactured goods, wares and merchandise, under sec. 88 and its schedule "C," together with the taking of a mortgage as further security for past advances or indebtedness.

The rights of a bank have been closely scrutinised by the Courts so that its transactions may be kept strictly within the Act, and I know of no instance where it has been attempted to obtain further security than the Act allows by means of loans on personal property of a debtor.

In *Ontario Bank v. McAllister* (1910), 43 Can. S.C.R. 338, by a narrow judicial majority, it was decided that a bank could take over a lease of real property as part of a going concern out of which it was making legitimate efforts to satisfy its loan; but that was a matter of implication and liberal judicial interpretation of the Act, and differs vastly from the lease in question here, which definitely expresses itself to be made by way of security. See also *Ball v. Royal Bank of Canada* (1915), 52 Can. S.C.R. 254, 26 D.L.R. 385.

The lease recites: (a) that the bank has already advanced large sums to the lessors in connection with their flax manufacturing business, and has acquired security therefor (i.e. under the Bank Act, sec. 88); (b) that to complete the manufacture of the goods the expenditure of further sums of money is required; (c) that the bank is willing to advance such further moneys only if the lessors will grant it a lease of their "horses, waggons, harness, automobiles, trucks, tools, implements, machinery, other than fixed, tractors, and generally all the goods and chattels upon the premises where the flax business is carried on."

The lease has therefore been executed, on the terms specified, as from its date, the 18th January, 1921, "until final completion of the manufacture and shipment of the goods."

This lease, the local bank-manager says, was taken for the purpose of security and to enable the bank to operate the business; but the inference to be taken from the evidence is

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that the bank did not actually operate the flax business, but left the leased articles with the company for that purpose, and the lease was taken by way of security only; and, after it had obtained this supposed security, the bank advanced further moneys for operating expenses, thereby increasing its advances from \$87,449 to \$93,408.

The bank might have taken a chattel mortgage upon the goods enumerated in the lease as further security for its overdue debt, and being thus further secured might have then made advances for further operating expenses; but either the flax company did not care to give such a chattel mortgage or the bank did not care to take such; and, perhaps for both reasons, no such security was given. A bill of sale might have been taken, and the requirements of the Bills of Sale and Chattel Mortgage Act been complied with, so that the transfer would have been notice to other creditors. But, by adopting the device of taking a lease, the main reason for requiring notice to the public by filing a document with the County Court clerk is defeated. The flax company, with a secret lease of all its personal property to one creditor, the bank, would be enabled to obtain credit from others to whom a search for incumbrances in the proper office would have been of no avail.

The words chosen to be the operative words in the lease are "demise and lease," which words apply to a lease of real estate. There can properly be no such lease made of personal property, because personal property has not the qualities of tenure, such as reversion or remainder, and the lessees of personal property acquire the whole of the property without limitation or equity of redemption remaining in the lessor. Such a lease is more in the nature of a pledge which can be retransferred when the debt is paid.

It was argued that the lease in any event was void for uncertainty as to term: *Marshall v. Berridge* (1881), 19 Ch. D. 233; *Mitchell v. Mortgage Co. of Canada* (1919), 48 D.L.R. 420; but it is not necessary to decide that point, if, as I find, the lease is invalid as exceeding the limits of the Bank Act.

It is to be observed, in addition, that the Bank Act (sec. 76 (b), (c), (d)) confines the bank to dealing in gold and silver coin and bullion, and to discounting and lending money upon the security of bills of exchange and other negotiable securities, and engaging in and carrying on such business generally as appertains to the business of banking; and (sec. 146 (a)) prohibits the bank from dealing in, buying or selling or bartering, goods, wares and merchandise, or engaging in any trade or

business. If the bank itself were using the leased goods to conduct a flax business, it would be a breach of the Bank Act, and would thus void the security. A bank-manager may harrow the feelings of his customer and plough into his financial statements, but for neither of these operations is a tractor necessary.

It is also to be observed that a bank, under sec. 141, is under a heavy penalty should it acquire a security except for discount made contemporaneously or under written promise to provide such, and this is an additional reason why the bank should be held strictly to its powers under the Act.

The claim of the bank, therefore, to be the owner of the tractors at the time of seizure by the execution creditor fails, and the issue is decided in favour of the execution creditor, the defendant, who will have his costs of the interpleader application and of the issue.

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Criminal Law—Conviction for Robbery while Armed—Application to Trial Judge for Reserved Case—Judge's Charge—Remark that Certain Evidence Uncontradicted—Whether Comment on Failure of Prisoner to Testify—Canada Evidence Act, sec. 4 (5)—View by Jury of Motor-car in which Prisoners Said to have Escaped after Robbery—Purpose of View—Criminal Code, sec. 958—Caution to Jury not to Base Finding on View—Evidence—Judge's Opinion as to Facts—Direction to Jury not to Consider themselves Bound by—Evidence of Statements Made by Deceased Person in Presence of Prisoners and not Contradicted—Admissibility—Indictment at Assizes for Offence Committed while Assizes being Held—Depriving Prisoners of Right to Elect to be Tried by County Court Judge—Absence of Election—Criminal Code, sec. 825 (5), Added by 8 & 9 Edw. VII. ch. 9, sec. 2.

The three prisoners were convicted at the Assizes, under sec. 446(c) of the Criminal Code, for robbery while armed. One of the prisoners asked the trial Judge to state a case for the opinion of the Court, upon five grounds:—

Held (1), that it is always open to the Judge to point out to the jury that certain evidence is uncontradicted; and a remark of the Judge in his charge that one of the prisoners "did not deny it," when charged to his face with having been the driver of the motor-car in which the robbers escaped, and a further remark that certain witnesses had identified the same prisoner, followed by the questions to the jury, "Have you any evidence the other way? If so where do you get it?" were not indirect comments upon the failure of that prisoner to testify on his own behalf (Canada Evidence Act, sec. 4 (5)).

Rex v. Aho (1904), 8 Can. Crim. Cas. 453, *Rex v. Burdell* (1906), 11 O.L.R. 440, 448, 10 Can. Crim. Cas. 365, 374, and *Rex v. Guerin* (1909), 18 O.L.R. 425, followed.

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(2) The provision of the Criminal Code, R.S.C. 1906, ch. 146, sec. 958, giving authority to the Judge to "direct that the jury shall have a view of any place, thing or person," does not make a view, when had, evidence: the purpose of a view by the jury is that expressed in the original statute, 4 Anne ch. 16, sec. 8, "in order to their better understanding the evidence."

London General Omnibus Co. Limited v. Lavell, [1901] 1 Ch. 135, 139, referred to.

History of the legislation.

The jury were allowed to view the car said to have been that in which the robbers had escaped—some evidence having been given about certain marks upon a car which had been bought with the money of one of the prisoners. The car was not made an exhibit. The Judge charged the jury in accordance with the law as above stated, and told them that they must determine the facts upon the evidence they heard in the witness-box only. The contention of counsel that the jury were entitled to reach such conclusions as could be taken from a view was erroneous.

(3) The charge was not unfair to the accused: the jury were told that they were to find the facts and were not to be governed by any opinion as to the facts expressed by the Judge.

(4) One B., who died before the trial, was sworn to have been on the scene of the robbery and afterwards to have identified two of the prisoners, to have said to one prisoner that it was he who ran the car and to another that it was he who ran out with the bag; it was also sworn that the prisoners did not deny the allegations. The evidence could not have been excluded.

(5) The Court at which the indictment of the prisoners was found was a Court having the same powers as the former Court of Oyer and Terminer and General Gaol Delivery; and Crown counsel may properly prefer an indictment in that Court, under secs. 872 and 873 of the Code. The right to be tried by a County Court Judge is given only where there has been an actual election by the prisoner. The offence charged being punishable by imprisonment for more than 5 years, the Attorney-General had the right to require the persons charged to be tried by a jury: Criminal Code, sec. 825 (5), added by (1909) 8 & 9 Edw. VII. ch. 9, sec. 2. The contention that the Crown had, by a precipitate presentation to the grand jury at the Assizes of the charge against the prisoners, deprived them of their right to elect to be tried by a County Court Judge without a jury, under Part XVIII. of the Code, was erroneous.

And the trial Judge refused to reserve a case.

Motion by *J. G. O'Donoghue*, K.C., for the prisoner Seniloff, for a reserved case.

February 7. RIDDELL, J.:—At the current Toronto Criminal Assizes the three prisoners were convicted before me, under sec. 446 (c) of the Criminal Code, for robbery while armed. I sentenced Sachuk and Kaplansky to imprisonment for life, as I considered—and consider—they too dangerous to be at large. The jury recommended Seniloff to mercy, believing that he had been led into crime by the other two; and I postponed sentence upon him until I could make inquiry. The two have made confessions of their own guilt in the form of statutory

declarations; but they declare that the only part played by Seniloff was lending them \$900 (with which they bought the car in which the robbers escaped) on the promise of "payment of \$100 for the use of it for a week or two," and that they "told him it was none of his business what they wanted it for."

Seniloff received \$1,000 of the money obtained by the robbery; and gave a false account of how he obtained it, to the police, to his counsel, and on oath at the trial.

I have been able to give effect to the recommendation to mercy made by the jury, by reason of the fact that I do not think him at all likely to repeat the offence. I sentenced him to 10 years' imprisonment.

He now asks me to reserve a case under sec. 1014 of the Code, the following grounds being set out in the motion-paper:—

1. Did your Lordship comment upon the failure of Kaplansky to give evidence?

2. Was your Lordship right in directing the jury that they must not use information acquired by them from a view of the car?

3. Was your Lordship's charge to the jury a fair one?

4. Was the evidence of statements by the late Mr. Burns admissible under the circumstances?

5. Had the Crown the right, by a precipitate presentation of the charge to the grand jury at the Assizes, to deprive the accused of their right to elect to take a trial by a County Court Judge without a jury, under Part XVIII. of the Criminal Code?

1. In speaking of Joseph Burns (now deceased) charging Kaplansky to his face with having been the driver of the car in which the robbers escaped, I said, "And he did not deny it." This was following my remarks as to the effect of omission to deny a charge of crime (to be spoken of later); and no one could have imagined that it referred to anything else.

I proceeded in the charge thus: "There are Warren, Monkhouse, Brounscombe, Connell, and Burns" (these witnesses had identified Kaplansky). "Have you any evidence the other way? If so where do you get it?" Such statements I have heard a score of times, both before and after the statutory provision permitting an accused to testify in his own behalf. I certainly did not "suggest or intend to suggest to the jury that the prisoner might have given evidence in his own behalf, or that an inference unfavourable to him might be drawn from the fact that he had not done so." See per Osler, J. A., in *Rex v. Burdell* (1906), 11 O.L.R. 440, at p. 448, 10 Can. Crim.

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Cas. 365, at p. 374. In *Rex v. Aho* (1904), 8 Can. Crim. Cas. 453, directing the jury that the accused had not accounted for a particular circumstance was held not to be a comment. In *Rex v. Guerin* (1909), 18 O.L.R. 425, I had told the jury that certain evidence was wholly uncontradicted; Mr. Curry moved for a reserved case on the ground that this was an indirect comment on the fact that the prisoner had not given evidence; I refused to reserve a case; and the matter was not taken farther.

It seems to me that it must always be open to the Judge to point out that certain evidence is wholly uncontradicted; and to rule that such a remark as was here made was in contravention of the Evidence Act* would have the effect of preventing this being done. To hold that this is prohibited by the Act would be to hold that the Act has not only authorised the accused to testify on his own behalf, but also has increased his protection if he chooses not to testify; it could not be pretended that such a statement would be objectionable at the common law. It appears to have been held that mention without unfavourable comment does not violate the Code: *Rex v. MacLean* (1906), 11 Can. Crim. Cas. 283.

2. This is probably the real ground of the application. It was sought by the Crown to establish that a car—now admitted to have been bought with Seniloff's money—was the car in which the robbers escaped. Some evidence was given on both sides as to certain marks upon the car bought with Seniloff's money, and at the time of the trial in a yard near to the courtroom.

After the evidence was all in, and counsel were to address the jury, Mr. O'Donoghue said, "I suppose the jury will look at the car?" Under sec. 958 of the Code, I gave directions that the jury, during the adjournment for luncheon, should see the car, in the presence of counsel for both sides, who might point to anything, but not explain or argue about anything; and I warned the jury not to make up their minds upon the result of their examination "until both counsel have spoken to you and you have heard my remarks."

In my charge, I directed the jury to apply their "minds solely and entirely to finding a verdict according to the evidence which you have heard adduced here in the box. When I per-

*By sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145: "Every person charged with an offence . . . shall be a competent witness for the defence . . . (5) The failure of the person charged . . . to testify shall not be made the subject of comment by the Judge, or by counsel for the prosecution."

mitted you to go and see the car it was not in order that you might make evidence for yourselves, it was only so that you might have a picture of the car on your minds and be able better to apply to it the evidence you have heard here in the box. If one of you found out some fact about that car when looking at it which was not given in evidence in the box, it was his duty to go into the witness-box and give evidence about it so that his fellow-jurors would have knowledge of it as well as he. You have no right to use knowledge acquired from any other place than the witness-box when determining your verdict. I possibly might have warned you before you saw the car what your duty was in that respect; I did not think it necessary. The object in your seeing the car was that you would be able to apply to it the evidence given in the witness-box. You must determine the facts of this case upon the evidence you heard in the witness-box, such part of it as you believed."

Certain objections were taken to the charge, all of which were acceded to with the exception of that as to the effect of the view. Counsel for the defence argued that "the jury are entitled to have every exhibit in the case and are entitled to reach such conclusions as can be taken from a view of the exhibits." I said: "The car was not an exhibit. I was asked to allow the jury to see the car. . . . It was never put in as an exhibit."

I stated my intention to ask the jury what would be the result if they used such knowledge and what if they did not, but I refrained from doing so, lest anything on my part might even throw doubt on law thoroughly established.

There is no foundation in history, principle, or authority for the claim of the prisoner.

Whatever may have been the rule at common law, as to which there seems to be some doubt, the modern practice of view began with the statute of (1705) 4 Anne ch. 16, which by sec. 8 provided for a view by the jury of "the messuages, lands, or place in question, in order to their better understanding the evidence that will be given upon the trial of such issues." A quarter of a century afterwards, the statute (1730), 3 Geo. II. ch. 25, sec. 14, followed, and then that of (1825) 6 Geo. IV. ch. 50, which by sec. 23 made a similar provision with the same object, "in order to their better understanding the evidence that may be given upon the trial" in any civil or criminal case.

The practice in England being quite clear, the Legislature of Upper Canada, as adjective to the Court of King's Bench just being established, in our first Jurors Act provided for a case

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“where a view shall be allowed,” (1794) 34 Geo. III. ch 1, sec. 14 (U.C.), but gave no direction as to the kind of case in which a “view shall be allowed,” that being covered by (1792) 32 Geo. III. ch. 1, sec. 3, and (1794) 34 Geo. III. ch. 2, sec. 14 (U.C.), which last section introduced “each and every of the statutes for the amendment of the law excepting those of mere local expediency . . . enacted respecting the law of England.” The section providing for a view remained unaltered in the revision of 1802 (p. 34). So far a view could be had only in civil cases. But in 1850 the statute 13 & 14 Vict. ch. 55 (Can.), by sec. 50, introduced the provisions of the English Act of 1825, so that a view of “the place in question” was allowed “in any case either civil or criminal . . . in order to their better understanding the evidence that may be given upon the trial.” This went by the board in 1859, when C.S.U.C. 1859, ch. 31, sec. 124, was substituted; but the object of the view was expressed in the same language.

In the *annus mirabilis* of criminal legislation, 1866, the Act of 1859 was *pro tanto* repealed and 29 & 30 Vict. ch. 46, sec. 1, was substituted, with no change in terminology; this came forward as R.S.C. 1886, ch. 174, sec. 171, which was in force until the coming into effect of the Criminal Code of 1892. So far it was only a “place” of which a view could be had, but the Code of 1892, 55 & 56 Vict. ch. 29, by sec. 722, gave authority to the Court to “direct that the jury shall have a view of any place, thing or person;” there is no suggestion that such view is at all different in its purpose from the view already well-known, and nowhere is a view made evidencer. This is the present statutory law (R.S.C. 1906, ch. 146, sec. 958). There is no historical basis for the prisoner’s claim.

Nor can the claim be supported on principle.

All the evidence is before “the Court and jury sworn;” it is the right and duty of the Judge to see and hear all the evidence; it is his right and it may be his duty to comment upon any part of the evidence. There is no law permitting the Judge to have a view; and if he had a view, the trial would be abortive: *Regina v. Petrie* (1890), 20 O.R. 317. To make an object of which a view is had evidence, it would be necessary to bring it before the Court in the court-room or for the Court to be adjourned to the place where the object was. The latter I should have done had I been asked, but I was not asked. The matter, probably, was too trivial to justify the able and experienced counsel for the prisoner making such a request.

At all events I did not see the object, and it was not in evidence.

Authority is the same way. So far as I know, it has been uniformly laid down in the English Courts and our own, that "a view . . . is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence:" per Lord Alverstone, C.J., in *London General Omnibus Co. Limited v. Lavell*, [1901] 1 Ch. 135, at p. 139. In that case Farwell, J., trying the action without a jury, viewed the two rival omnibuses of the parties and decided upon the evidence of his own eyesight that that of the defendant was an unlawful imitation of the other. On appeal, counsel for the plaintiffs (pp. 136, 137) said: "The practice is, where a jury has had a view, not to call evidence to shew what the facts are, the jury being able to see them for themselves." Lord Alverstone said: "I have never heard it suggested before that the plaintiff in an action for deceit could rely upon a view alone for proving his case." In giving judgment, Lord Alverstone gave the theory of the purpose of a view in the words already quoted. Rigby, L. J., entirely agreed in those observations (p. 140).

I can find no case which holds the contrary in the English reports or our own; and it has always been held that the object of a view in a case, civil or criminal, is that expressed in the original statute, 4 Anne ch. 16, sec. 8, "in order to their better understanding the evidence." See also *Chute v. State of Minnesota* (1872), 19 Minn. 271, at p. 281; *Brakken v. Minneapolis and St. Louis Railway Co.* (1881), 29 Minn. 41, at p. 43; *Close v. Samm* (1869), 27 Ia. 503, at p. 507; *Regina v. Martin* (1872), L.R. 1 C.C.R. 378; Thompson on Trials, vol. 1, sec. 889; Taylor on Evidence, 11th ed., vol. 1, pp. 389-391.

Of course a contrary rule obtains in some of the United States, as is detailed in the voluminous works of Wigmore and Thompson; the decisions are not of authority with us, and I do not quote them.

The *obiter* statement in my charge that jurors cannot use private knowledge but must be sworn, I need not pursue. The *obiter* doubts of Armour, C. J., in *Regina v. Petrie*, 20 O.R. 317, seem unfounded. See *Manley v. Shaw* (1840), Car. & M. 361; *Regina v. Rosser* (1836), 7 C. & P. 648; *Rex v. Sutton* (1816), 4 M. & S. 532; nor may a Judge use private knowledge: *Hurpurshad v. Sheo Dyal* (1876), L.R. 3 Ind. App. 259, at p. 268; *Regina v. Sproule* (1887), 14 O.R. 375, at p. 386, and cases cited.

It has no effect on my judgment, but it may be observed that

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the reason for the defendant's wishing a view was to dispute the identity of the car in the court-house yard with a car sworn by one Connell to have collided with a post. All this might have been omitted by the Crown without a weakening of the case against the accused.

3. I fail to apprehend the purport of the objection. I fully charged the jury that, as they could not take it upon themselves to correct me in my law, "when it comes to fact the reverse is the case; I do not dictate to you what facts you shall find; you have taken your oaths . . . to find the facts . . . and it is upon your responsibility to your Maker, you must find the facts." Speaking of the Judge expressing a view of the facts, I said: "If he does so, the jury are not bound by that at all . . . he in no wise takes away from them the responsibility on their oaths to find a verdict upon the evidence as they believe it." "You are not to be governed by what I think; it is for you to make up your mind what part of the evidence you believe, and upon that you find your verdict." Over and over again it was brought home to the jury that they were the sole judges of the fact, and no objection was taken to the charge in that respect.

4. Joseph Burns (now deceased) was sworn to have been on the scene of the robbery (Denike); then to have identified Kaplansky and Seniloff, to have said to Kaplansky that he ran the car, and to Seniloff that he was the fellow that ran out with the bag. The prisoners did not deny the allegations. I am at a loss to understand how I could have excluded this evidence: Phipson on Evidence, 6th ed., pp. 255 *sqq.*

5. That an indictment could be preferred before a Court of Oyer and Terminer and General Gaol Delivery for an offence committed during the sittings of such Court and before the termination of the commission cannot be doubted. The Court at which this indictment was found was a Court having the same powers as the former Court of Oyer and Terminer and General Gaol Delivery; and Crown counsel may prefer an indictment in that Court, under secs. 872 and 873 of the Code. That was, as I understand it, done in the present case, and properly so done. The provisions of Part XVIII. do not assist; the right to be tried by a County Court Judge is given only where there has been an actual election by the prisoner: *Rex v. Komiensky* (1903), 6 Can. Crim. Cas. 524; *Rex v. Sovereign* (1912), 26 O.L.R. 16, 4 D.L.R. 356, 20 Can. Crim. Cas. 103.

Moreover, as the offence here charged could be punished by

imprisonment for more than 5 years, the Attorney-General had the right to require the persons charged to be tried by a jury: Code, sec. 825 (5), added by (1909) 8 & 9 Edw. VII. ch. 9, sec. 2.

I refuse to reserve a case.

The sheriff will be well advised not to remove the prisoner Seniloff to the penitentiary for 10 days or until after the disposition by the Court of Appeal on a reserved case, if such a case should be ordered.

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Note: No further or other application was made. †

[APPELLATE DIVISION.]

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FLEXLUME SIGN CO. v. MACEY SIGN CO.

Feb. 9.

June 12.

Crown—Action for Infringement of Patent for Invention—Counterclaim for Rescission of Patent and for Damages—Crown Made Defendant to Counterclaim upon Fiat of Governor-General—Summons Improperly Issued and Served upon Crown—Rule 113—Order of Master in Chambers Allowing Amendment of Counterclaim—Change in Nature and Scope of Counterclaim and Addition of Party Defendant—Amendment Improper without New Fiat—"Petition of Right"—Commissioner of Patents Added as Defendant in Official as well as Personal Capacity—Absence of Statutory Authority—Improper Joinder—Practice.

The plaintiffs sued for an injunction and damages, alleging the infringement by the defendants of a certain patent of invention. The defendants delivered a counterclaim alleging certain wrongful acts on the part of the plaintiffs and of the Commissioner of Patents in connection with the re-issue of the patent on which the plaintiffs' action was brought, and asked for judgment declaring the patent illegal and void and rescinding it and for damages against the defendants by counterclaim, who were the original plaintiffs and His Majesty (in the right of the Dominion Government), the latter being joined as a defendant upon the fiat of the Governor-General. Afterwards, on the application of the defendants (plaintiffs by counterclaim), an order was made by the Master in Chambers allowing them to amend, by adding as a defendant to the counterclaim O'H., "personally and in his capacity of Commissioner of Patents," by inserting certain allegations against him, by varying the prayer of the counterclaim so as to include a claim for a writ of *scire facias* for the purpose of rescinding the patent, and by limiting the claim for damages to the original plaintiffs and O'H. personally and as Commissioner of Patents, or in one of such capacities:—

Held, that the counterclaim was, in essence and in fact, a petition of right; and, whether it was so or not, the principles applicable to petitions of right must be applied to it.

Even if the Court has power in some cases to amend a petition of right without the consent of the Crown, that power must be limited to minor matters, and cannot go the length of allowing a suppliant to change the character of his claim against the Crown, either by ad-

1922. ding to it or withdrawing part of it, or by adding parties as co-defendants with the Crown.
- FLEXLUME SIGN CO. *Smylie v. The Queen* (1900), 27 A.R. 172, 181, and *Crombie v. The King* (1922), *ante* 512, considered.
- v. *Semble*, that the Supreme Court of Ontario could not pronounce a judgment directing the issue of a writ of *scire facias* to rescind the patent.
- MACEY SIGN CO. *Semble*, also, that the defendant O'H. could not be sued in his capacity of an officer of the Crown, there being no statutory authority for so suing him.
- Graham & Sons v. Works and Public Buildings Commissioners* (1901), 70 L.J. K.B. 860, *Bainbridge v. Postmaster-General*, [1906] 1 K.B. 178, and *Dixon v. Farrer, Secretary of the Board of Trade* (1886), 18 Q.B.D. 43, distinguished. *Bombay and Persia Steam Navigation Co. v. Maclay*, [1920] 3 K.B. 402, followed.
- An officer of the Crown may be sued in his personal capacity for something done or omitted by him in his official capacity.
- Palmer v. Hutchinson* (1881), 6 App. Cas. 619, referred to.
- Semble*, also, that a summons, in the form provided by Rule 113 for service upon any person (other than the original plaintiff) who is joined as a defendant to a counterclaim, was improperly issued from the central office of the Supreme Court of Ontario for service upon the Crown. It is an absurdity for the Sovereign to command himself to enter an appearance.
- Order of the Master in Chambers reversed.

APPEAL by His Majesty and George F. O'Halloran, defendants to a counterclaim, from an order of the Master in Chambers, made upon the application of the plaintiffs by counterclaim (the defendants in the action), allowing the statement of defence and counterclaim to be amended.

December 16, 1921. The appeal was heard by ORDE, J., in Chambers.

M. L. Gordon, for the appellants.

Frank Arnoldi, K.C., for the Macey Sign Company, plaintiffs by counterclaim.

February 9, 1922. ORDE, J.:—The action of the original plaintiffs, the Flexlume Sign Company, against the Macey Sign Company, involves the alleged infringement by the latter company of a certain patent of invention belonging to the plaintiffs. The defendants delivered a statement of defence and counterclaim, and as a defendant to the counterclaim, in addition to the original plaintiffs, the defendants joined His Majesty the King (in the right of the Dominion Government), obtaining upon the counterclaim the fiat of His Excellency the Governor-General, which was of course necessary before the Crown could be brought into Court as a party defendant.

Upon the filing of the counterclaim with the Governor-General's fiat, the plaintiffs by counterclaim procured from the

central office a summons, in the form provided by Rule 113 for service upon any person other than the original plaintiff who is joined as a defendant to a counterclaim, and served it upon the Crown. I do not think anything turns upon this feature of the case, but I draw attention to the issue of this summons because of its anomaly. The summons is issued from the central office, and is in the form of a writ. Its opening words are as follows: "George the Fifth, by the Grace of God . . . To His Majesty the King. Whereas . . . We command you that within ten days," etc. Whether the submission by the Crown of the counterclaim against it to the adjudication of the Supreme Court of Ontario so far imports a strict compliance with Rule 113 as to justify issuing a summons by His Majesty to himself, may be open to serious question. For the Sovereign to issue a writ commanding himself to enter an appearance would be amusing if it occurred in Alice in Wonderland, or in some of the topsy-turvey countries visited by Gulliver, but would hardly seem possible in a British Court of Justice. It is highly improper that such a document should have issued from the office of the Supreme Court. No objection has been raised on this score, and what I have said must not be deemed a ruling as to the regularity or otherwise of the issue of a summons under Rule 113 directed to His Majesty.

By the counterclaim, as originally delivered, the Macey Sign Company set up certain alleged wrongful acts on the part of the Flexlume Sign Company, and of the Commissioner of Patents in Ottawa, in connection with the re-issue of the patent of invention upon which the Flexlume Sign Company's action was brought, and asked for judgment declaring the patent illegal and void and rescinding and setting the same aside, and for damages against the defendants by counterclaim jointly and severally.

On the 10th November, 1921, the Master in Chambers, on the application of the plaintiffs by counterclaim, made an order allowing the statement of defence and counterclaim to be amended by adding as a party defendant to the counterclaim "George F. O'Halloran, personally and in his capacity as Commissioner of Patents," and by inserting certain allegations as against such added party, and by varying the prayer of the counterclaim so as to include a claim "for the issue of a writ of *scire facias* to effect this purpose," that is, the rescinding of the patent in question, and further by limiting the claim for damages to the "Flexlume Sign Company and George F. O'Halloran, personally and as Commissioner of Patents, or in one of

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such capacities.”

From that order His Majesty and Mr. O'Halloran now appeal.

The appeal presents two distinct questions for determination: (1) whether or not the counterclaim against His Majesty can be so amended without a further fiat; (2) whether or not an action can be brought against George F. O'Halloran “in his capacity as Commissioner of Patents.”

On behalf of the Crown it is argued that no amendment can be made to the counterclaim without the further fiat of His Excellency. Mr. Arnoldi contends that by granting the fiat the Crown has submitted the subject-matter of the counterclaim and the claim against the Crown thereunder to the adjudication of the Supreme Court of Ontario, and incidentally to all the Rules of that Court, including those permitting the amendment of pleadings. No case exactly in point has been cited, and the situation is rather an unusual one; but, nevertheless, there are certain broad principles applicable to the questions involved which, in my judgment, simplify their determination. Mr. Arnoldi argues that the counterclaim is not a petition of right; but, if it is not a petition of right, it is not so merely as a matter of nomenclature, because in all other respects it is a petition of right. In so far as the Crown is concerned, it is not a counterclaim but a distinct action; and, even if it were a counterclaim delivered in an action brought by the Crown, it could not be delivered without the consent of the Crown: *Attorney-General for Ontario v. Hargrave* (1906), 11 O.L.R. 530; *Attorney-General for Ontario v. Russell* (1921), 49 O.L.R. 103, 64 D.L.R. 59. If a counterclaim sought to be pleaded against the Crown is to be treated as a distinct action, and so as requiring a fiat, in cases where the Crown is the original plaintiff, it cannot be that the Crown stands in any different or inferior position when the Crown is sought to be added as a party defendant with the original plaintiff to a counterclaim raised by the original defendant. The fact that the plaintiffs by counterclaim were obliged, before delivering their counterclaim, to obtain His Excellency's fiat—a procedure applicable only, so far as I know, to petitions of right—establishes, I think, beyond all question, that the counterclaim here is, in essence and in fact, a petition of right, by whatever term the parties may choose to style it. But, whether or not it is a petition of right, I can see no reason for applying to the question now raised any other principles than those applicable to petitions of right. Whether or not the Court has power in some cases to amend

a petition of right without the consent of the Crown does not seem to be very clearly settled. But the trend of authority and principle would seem to be against the exercise of any such power. If exercisable at all, the power to amend must, in my opinion, be limited to minor matters, and cannot go the length of allowing a suppliant to change the character of his claim against the Crown, either by adding to it or withdrawing part of it, or by adding parties as co-defendants with the Crown. "The Crown has granted a fiat to a particular petition, and it is obviously not within the subject's competence to amend it into something else without the Sovereign's leave:" Robertson's Civil Proceedings by and against the Crown, p. 390; Halsbury's Laws of England, vol. 10, p. 33.

In the case of *Smylie v. The Queen* (1900), 27 A.R. 172, the Court of Appeal appears to have allowed an amendment to a petition of right: see per Osler, J.A., at p. 181; but the character of the amendment is not indicated, nor does there seem to have been any argument upon the point or any opposition by the Crown. As the Court was at the same time dismissing the suppliant's petition, the amendment can hardly have been of much consequence. The decision cannot be regarded as an authoritative ruling that the Court has power to amend a petition of right against the will of the Crown.

Mr. Arnoldi has referred me, since the argument, to a recent decision of the Chief Justice of the Common Pleas in *Crombie v. The King* (1922), ante 512, in which it is held that the Crown (in the right of the Provincial Government) is bound by the Rules as to the production of documents. But there is a great difference between holding that the Crown is bound, as to the issues which it has allowed to be submitted to the Court for adjudication, by all the Rules of procedure of that Court, and holding that the mere fact that the Crown has allowed certain issues to be submitted to the Court entitles the suppliant to compel the Crown to have those issues presented in a form differing from that to which the Crown assented. The fiat "Let right be done" must surely mean "Let right be done between me (the Sovereign) and my subject upon the claim which my subject has here set up against me and in the form here set up according to the practice of the Court in which the proceedings are brought." But this cannot possibly carry with it the right, at the instance of the subject, to submit some other claim against the Crown, whether it is enlarged or modified, for adjudication. In *Crombie v. The King* reference is made to the statutory effect of the Rules, but in that case the Crown was a party in the right of the Provincial Government.

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The amendments here are of three kinds. First, the claim against the Crown for damages is abandoned. Mr. Arnoldi contends that the plaintiffs by counterclaim are entitled to do this by way of amendment. It is obvious, of course, that at the trial a suppliant might abandon part of his claim against the Crown without affecting his right to proceed with the trial of the rest of his claim; but Mr. Gordon says that, if the counterclaim against the Crown had been limited at the outset to a prayer merely for a declaratory judgment as to the validity of the patent, no fiat would have been granted, because a patent may be declared invalid without joining the Crown. I agree with Mr. Gordon's view that an amendment that has the effect of abandoning one of the claims against the Crown may so change the character of the issues as to require the fiat of the Crown before the amendment can be allowed.

Then there is the addition of a prayer for judgment "for the issue of a writ of *scire facias*." When it is remembered that a writ of *scire facias* is not a writ by way of execution or in aid of a judgment, but a writ which, like a writ of summons, is issued at the commencement of an action to set aside or rescind letters patent issued by the Crown, and that the writ is issued at the suit of the Crown (though frequently by a subject with the approval of the Attorney-General, but always in the name of the Sovereign as plaintiff), one is puzzled to know in what way the Supreme Court of Ontario can pronounce a judgment for the issue of a writ of *scire facias* to rescind or set aside the patent in question here. But, however that may be, there is here a fresh demand set up against the Crown, which the Crown has not submitted to the Court for determination.

And the third matter of importance is the attempt to add another party as defendant to the counterclaim. The Crown has permitted a claim to be set up against it jointly or as a co-defendant with the original plaintiff. But the Crown, while willing to be connected as a party defendant with one person, may reasonably object to being so connected with some other person, even though that other person is one of the Crown's own servants or officers. One can suggest many grounds which might move the Crown and its advisers to refuse a fiat because of the joinder of some other person as a co-defendant. And I think the Crown is entitled to say whether or not, under such circumstances, the fiat already granted shall stand or be withdrawn.

On all three grounds, I am, therefore, of the opinion that the

order of the Master in Chambers amending the counterclaim is erroneous and must be set aside, and that the defendants must either proceed to trial on the counterclaim as originally delivered or else procure His Excellency's fiat upon the counterclaim in the form in which the defendants propose to bring it to trial.

My ruling on the first question really disposes of the second so far as the Master's order is concerned, but it is perhaps as well that I should deal with it. The contention of the defendants (plaintiffs by counterclaim) that an official of the Crown can be sued in his official capacity is to me an extremely novel one. I know of no authority for it, except in cases where it is expressly authorised by some statute. Those cases in which the Attorney-General can sometimes be made a party defendant, when a declaratory judgment is sought, furnish, so far as I am aware, the only exception to the rule. Mr. Arnoldi relies on certain cases as supporting his argument, but I find on examination that they really fall into three categories. The defendant was either a corporation, or was sued in his official capacity by virtue of some statute authorising such action, or was really sued personally for something done in his official capacity.

The case which Mr. Arnoldi pressed upon me as settling the question, *Graham & Sons v. Works and Public Buildings Commissioners* (1901), 70 L.J.K.B. 860, has no application, in my judgment, because the Commissioners were in fact a corporation and were sued as such. It is true that as a corporation they constituted a department of the Government, but they were being sued in their corporate as distinct from their official capacity, just as an individual officer of the Crown might be sued in his personal capacity for some act or omission in the course of his official duties. Had the Commissioners not been a corporation, but performing their official duties as a collection of individuals, I cannot think that they could have been sued otherwise than in their individual names and in their personal capacity.

In *Bainbridge v. Postmaster-General*, [1906] 1 K.B. 178, an action brought against the Postmaster-General in his official capacity, it is pointed out, at p. 186, that the Postmaster-General in England is by legislation a corporation, and that an action lies against him in his corporate capacity.

In *Dixon v. Farrer, Secretary of the Board of Trade* (1886), 18 Q.B.D. 43, an action was brought against the defendant in

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his official capacity, but this was done under sec. 10 of the Merchant Shipping Act of 1876, which provides that an action may be brought against the Secretary of the Board of Trade "by his official title as if he were a corporation sole."

Cases like *Gidley v. Lord Palmerston* (1822), 3 Brod. & Bing. 275, and *Raleigh v. Goschen*, [1898] 1 Ch. 73, are examples of actions brought against persons occupying official positions for something done or omitted in connection with their office, but the defendant in each case is sued in his personal and not in his official capacity. Mr. Arnoldi argues that the Crown and its revenues can indirectly be reached through a judgment against one of the Crown's servants in his official capacity. But without statutory authority I cannot agree with this proposition. It is not suggested that there is any statute which authorises any such action as this against the Commissioner of Patents. Whatever liability he may have incurred to those who are now claiming damages against him because of some alleged breach of duty on his part in the exercise of his official duties, assuming that any such breach of duty can legally give rise to such a claim, must necessarily be a personal and not an official liability. If any further authority were needed on the broad principle, it is furnished by the judgment of the Judicial Committee in *Palmer v. Hutchinson* (1881), 6 App. Cas. 619. The recent case of *Bombay and Persia Steam Navigation Co. v. Maclay*, [1920] 3 K.B. 402, is directly in point.

So that, apart from the other grounds upon which the order of the Master in Chambers has been set aside, I am of the opinion that the addition of Mr. O'Halloran as a party defendant to the counterclaim in his official capacity as Commissioner of Patents and the amendments claiming against him in that capacity, as distinct from his personal capacity (whatever that distinction may be intended to mean), are unwarranted by the practice of the Court.

The order of the Master in Chambers in question will therefore be reversed, with costs both of the original motion and of this appeal, payable by the plaintiffs by counterclaim to the Crown and to the defendant by counterclaim O'Halloran in any event.

The plaintiffs by counterclaim appealed from the order of ORDE, J.

June 12. The appeal was heard by MULOCK, C.J. EX., KELLY, MASTEN, and ROSE, JJ.

Arnoldi, K.C., for the appellants.

Gordon, for the Crown and George F. O'Halloran, Commissioner of Patents, respondents.

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THE COURT dismissed the appeal with costs.

[MIDDLETON, J.]

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CHAPMAN V. ROSE-SNIDER FUR CO.

Feb. 9.

ROSE V. ROSE-SNIDER FUR CO.

Receiver—Partnership Action—Ex Parte Order—Undertaking as to Damages—Rules 213, 216—Practice—Necessity for Notice of Motion—Judgment for Winding-up of Partnership—Receiver Appointed for Purposes of Liquidation—Parties—Costs.

Rule 213 is peremptory and renders a notice of motion necessary in every case, save that provided for in Rule 216—where the Court is satisfied that the delay necessarily caused by giving notice of motion may entail serious mischief.

Joss v. Fairgrieve (1914), 32 O.L.R. 117, followed.

Rule 216 is wide enough to permit the making of an order for a receiver *ex parte*, but the preliminary condition must be satisfied.

Save in cases of extreme urgency, a receiver should not be appointed upon an *ex parte* application.

Lucas v. Harris (1886), 18 Q.B.D. 127, 134, and *Tilling Limited v. Blythe*, [1899] 1 Q.B. 557, 558, followed.

An *ex parte* order appointing a receiver, operating in effect as an injunction, should contain an undertaking as to damages.

In the circumstances of these cases, separate actions for dissolution of the same partnership, a motion to continue a receiving order in one action was dismissed, and the action was stayed, the plaintiff therein being added as a party in the other action, in which a judgment was pronounced for the winding-up of the partnership, and a receiver appointed for the purposes of the liquidation, with a special direction as to costs.

MOTION by the plaintiff in the first action for an order continuing a receiver and by the plaintiff in the second action for an order for the appointment of a receiver.

February 8. The motions were heard by MIDDLETON, J., in the Weekly Court, Toronto.

H. S. White, K.C., and H. G. Smith, for the plaintiff Rose.

R. G. McClelland, for the plaintiff Chapman.

A. Cohen, for the defendant Morris Rose.

John J. Glass, for the estate of Joseph Snider.

February 9. MIDDLETON, J.:—This partnership ended by the death of Joseph Snider on the 24th December, 1921. Some of the surviving partners have been endeavouring to get the affairs into shape for a final accounting and dissolution. In the *Rose* case the plaintiff began his action on the 2nd February,

Middleton, J. 1922, asking for dissolution and the appointment of a receiver. On the 3rd February, Chapman began his action by the issue of a writ of summons in which he asked for dissolution and the appointment of a receiver; a motion was made before my brother Orde, and an *ex parte* order made appointing Mr. H. N. Goodman receiver, without security, the appointment to be good until to-day and until any motion to continue the appointment should be disposed of. This order contains no undertaking as to damages.

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Under this order Mr. Goodman has taken possession and evicted the surviving partners. A motion is now made in the *Rose* case to appoint Mr. Clarkson receiver and in the *Chapman* case to continue the appointment of Mr. Goodman. The appointment of Mr. Goodman in the way indicated is attacked by the plaintiff in the *Rose* case, and by certain of the defendants, as being entirely improper and indefensible.

Rule 213 requires that any application in an action shall be made by motion, of which notice shall be given to all parties affected by the order sought. This Rule is peremptory and renders a notice of motion necessary, save in the case provided for by Rule 216: *Joss v. Fairgrieve* (1914), 32 O.L.R. 117.

Rule 216 provides that, if the Court is satisfied that the delay necessary to give notice of motion may entail serious mischief, the Court may make an interim order *ex parte*. I have no doubt that this Rule is wide enough to permit the making of an order for a receiver *ex parte*, but the preliminary condition must be satisfied. It must be shewn that the delay necessary to give notice of motion will or may entail serious mischief.

The affidavit upon which this order was obtained made no such suggestion. Chapman merely swears that he is a member of the firm; that the partnership terminated on the death of Snider on the 24th December; that he has interviewed the other members of the partnership, who have neglected and refused to pay him his share of the profits; that the defendants are in control; that his share is 15 per cent. of the profits for the year 1921 (he had no capital invested); that Rose is in possession and refuses to give him information; that the assets outside of cash in bank amount to \$3,000; that he desires a receiver appointed; and that Goodman is an authorised trustee under the Bankruptcy Act and bonded for \$15,000 under that Act.

Apart from the peremptory requirements of our Rule as to notice, which goes far beyond anything found in the English Act, the impropriety of the *ex parte* appointment of a receiver, save in cases of most extreme urgency, is emphasised by two decisions of the Court of Appeal in England.

In *Lucas v. Harris* (1886), 18 Q.B.D. 127, Lord Justice Lind-

ley says (p. 134): "*Ex parte* applications for a receiver ought not to be granted . . . except in cases of emergency, and it is desirable that this rule should always be borne in mind, and not lightly departed from."

In the later case, *Tilling Limited v. Blythe*, [1899] 1 Q.B. 557, A.L. Smith, L.J., after referring to what was said by Lord Justice Lindley, adds (p. 558): "The meaning of that decision is that orders for a receiver should not be made without due notice, so that the defendant may have an opportunity of being present to shew cause why the order should not be made."

I have discussed the matter with my learned brother; and he agrees with me that his order was made *per incuriam*, and should not be continued.

Upon the discussion of the case, although there may be some issues of fact, it was admitted by all counsel that no good purpose would be served by merely making an interim order upon the present application; and, therefore, I direct that these motions be turned into motions for judgment, and that in the *Rose* action a judgment shall be pronounced for the winding-up of the partnership and referring the case to the Master in Ordinary to take all necessary accounts and proceedings for the final adjustment of the rights of all parties and the winding-up of the firm. Morris Chapman should be added as a party defendant in the *Rose* action, so that he may have a *locus standi* to assert his rights. In that action I now make an order appointing Mr. Clarkson the receiver for the purposes of the liquidation—he is to give security, unless it is dispensed with, within three days. The costs of all parties in the *Rose* action are to be in the cause, and the Master is to deal with the costs of the action.

In the *Chapman* action the motion will likewise be turned into a motion for judgment, and, inasmuch as the order ought not to be continued, the motion to continue it will be dismissed with costs to be paid by the plaintiff to the defendants; these costs, when taxed, to be carried into the accounting in the other action, and payment not to be enforced by execution. There will be no other costs of the *Chapman* action. Chapman will be entitled to be treated as though a party to the *Rose* action and to be allowed his costs of attending upon the motion in that action as though he had been a party prior to the hearing of the motion and attended thereon.

All further proceedings in the *Chapman* action will be stayed, as the further prosecution is unnecessary in view of the judgment in the *Rose* action.

Any *ex parte* order appointing a receiver, operating in effect as an injunction, should contain an undertaking as to damages.

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[RIDDELL, J.]

Feb. 19.

REX v. HARRI.

Criminal Law—Procedure at Trial—Questioning Juryman—Challenge—Criminal Code, secs. 935, 936—Addresses of Counsel Made to Court and Jury—Witnesses—Trial for Murder—"Day of the Murder."

Upon the selection of a jury at a criminal trial, a juryman may be peremptorily challenged or challenged for cause (Criminal Code, secs. 935, 936), but he may not be questioned.

Rex v. Peter Cook (1696), 13 St. Tr. 311, 334, and *Rex v. Edmonds* (1821), 4 B. & Ald. 471, 492, followed.

A criminal trial is before "the Court and jury sworn"—not before the jury alone—and counsel must address both the Court and the jury.

A witness upon the trial of an accused person for murder has no right, in giving evidence, to speak of a "murder."

February 10. David Harri was tried before RIDDELL, J., and a jury, at the Toronto Assizes, on a charge of murder.

Gordon Waldron, K.C., for the Crown.

John J. Glass, for the prisoner.

During the calling of the jury, counsel for the prisoner said that he would like to question a juryman.

RIDDELL, J.:—No, you cannot question him, you can challenge for cause, and the matter will then be tried, but you cannot question the juryman. We have no such system as obtains in some of the American courts—I think I had better give a formal ruling on the point so that it may be of record.

Counsel for the prisoner desiring to question a juryman before he was sworn, I rule that that is not permissible in our practice. This was decided, so far as I know, only once in this Province—in 1833—by Chief Justice Robinson, of the Court of King's Bench of Upper Canada, upon the trial (at Brockville for murder in a duel) of John Wilson, who was afterwards a Judge of the Court of Common Pleas (35 Canadian Law Times, September, 1915, pp. 726 *sqq.*) We have never introduced into this Province the practice which seems to be common in the United States; we have followed the English practice: *Rex v. Peter Cook* (1696) 13 St. Tr. 311, 334; *Rex v. Edmonds* (1821), 4 B. & Ald. 471, 492.

According to our practice, there are two kinds of individual challenge: the peremptory challenge and the challenge for cause. The peremptory challenge can be exercised at the proper time

to an extent mentioned in the Criminal Code. In a challenge for cause, the cause must be stated (Code, secs. 935, 936); and there is a regular way of trial of that cause, to determine whether the juryman is or is not to serve.

I make that ruling now so that it may be borne in mind. Very many, particularly of the younger barristers, seem to imagine that we have introduced what is to me an exceedingly objectionable practice. I may say that I have seen the questioning of a juryman only once in our Courts; that was at the Assizes of Ottawa before the late Mr. Justice Robertson, upon the trial of a woman for cruelty to her children, in which I was of counsel for the Crown, and Mr. Fripp was counsel for the prisoner. I did not, on behalf of the Crown, object to it being done, although I stated that it was not regular. In that particular instance it was allowed; but I think the practice should not be permitted to spread.

Waldron, K.C., for the Crown. There is another question of practice. I have long observed that counsel in rising to open a criminal case sometimes turns to the jury at once.

RIDDELL, J.:—That is improper. A criminal trial is before “the Court and jury sworn,” not before the jury alone. I had better make a formal ruling so that it may be of record. A criminal trial, being before the Court and jury sworn, the proper course for counsel in making any address is to begin by addressing the Court. The Court and the gentlemen of the jury are both addressed in every address by counsel—Crown counsel or counsel for the defence.

During the course of the trial a witness spoke of “the day of the murder.”

RIDDELL, J.:—You have no right to talk about a “murder:” it is for the jury to decide whether there was a murder. You may say “the day of the death,” “the day of the tragedy,” “the day of the event,” “the day of the circumstance,” or the like; no one but the prisoner or his counsel may call it a murder.

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GEORGE V. CANADIAN NORTHERN RAILWAY CO.

Railway—Carriage of Goods—Intoxicating Liquors Imported from Great Britain—Theft of Part from "Sufferance Warehouse"—By whom Loss to be Borne—Notice to Owner of Arrival of Goods—Reasonable Time for Removal—Carrier—Warehouseman—Negligence—Insecure Condition of Warehouse Provided by Railway Company for Customs Purposes—Customs Regulations—Clearing of Goods not Permitted till Liquors Gauged—Damages—Cost of Replacement of Stolen Goods—Proportion of Duty Paid on whole Consignment—Possibility of Refund by Crown.

A large quantity of intoxicating liquor, in bottles and cases, shipped from Great Britain to the plaintiff, the owner, addressed to him at his place of residence in Ontario, reached that place early in the morning of the 27th June, having been carried from Montreal by the defendant company's railway. A servant of the company telephoned to the plaintiff shortly after the arrival of the goods, informing him that they had arrived intact and in good order. This man kept watch over the cases on the platform of the railway station, opposite the "sufferance warehouse," until they were handed over to the Customs officers and placed in the warehouse. The railway servant again telephoned to the plaintiff, about noon, told him what had been done with the cases, and asked him when he could clear them from the Customs. The plaintiff said he would take them as soon as cleared. On the following day, the company gave the plaintiff written notice of the arrival by a post-card dated and post-marked on that day. In the morning of that day, a Customs officer discovered that the warehouse had been opened and a large number of cases stolen; they were not recovered. The entry was effected by unscrewing the hasp and taking it off the door:—

Held, that the responsibility of the company as carrier had not ceased when the theft was committed. The plaintiff had not had time or opportunity to take over the goods—a reasonable time must always be allowed for the removal.

If the oral notice on the day of the arrival put the duty on the plaintiff of at once removing the goods, that was answered by the Customs regulations that they could not be cleared until they had been gauged, and the gauging could be done only by sending a bottle to a place many miles away.

As carrier the company was liable for the loss without proof of negligence.

But the company took the position that it was merely a warehouseman, and charged the plaintiff storage from the 27th June to the 18th July. As a warehouseman for hire, the onus of accounting for goods which it could not return to the owner was upon it, and it had not satisfied that onus by shewing circumstances which would negative negligence.

Pratt v. Waddington (1911), 23 O.L.R. 178, and *Carlisle v. Grand Trunk Railway Co.* (1912), 25 O.L.R. 372, followed.

Under the regulations of the Customs Department, a railway company must provide a secure and commodious "sufferance warehouse," in connection with its station, for landing, storing, etc., bonded goods; but the warehouse is not a warehouse merely for the purposes of the Customs; it is the company's warehouse as between the company and the bailor; and in this case the company, if a warehouseman, was liable for the negligence displayed in the insecure condition of the warehouse.

Brown v. Dominion Express Co. (1921), 51 O.L.R. 359, where the goods were "at owner's risk," distinguished.

The plaintiff was entitled to damages based on the value at the date of the trial of the goods stolen. The proportion of the Customs duty imputable to the cases stolen, the plaintiff having paid duty on the whole consignment, should also be allowed to him as damages, unless it had been or should be refunded by the Crown.

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AN action for damages for the loss of 76 cases of Scotch whisky, consigned to the plaintiff at Fort Frances, and said to have been stolen from the defendant company's warehouse there.

The action was tried by MOWAT, J., without a jury, at Port Arthur.

F. R. Morris, K.C., for the plaintiff.

F. H. Keefer, K.C., for the defendant company.

February 14. MOWAT, J.:—The plaintiff, living at Fort Frances, purchased in Great Britain, on the 7th June, 1921, 100 cases of Scotch whisky, and prepaid the freight. The vendors shipped by C.P.O. steamer *Megantic*, and the shipping company reshipped from Montreal Wharf to Fort Frances by the defendant company's line. The goods being bonded goods, a "pink manifest" in triplicate was issued, but the bill of lading was not put in at the trial. The consignment reached Fort Frances at 8.35 a.m. on the 27th June, and was under special guard on the freight-train up to the time of its arrival, and also until 11 a.m. after removal from the freight-car. The reason for this guard was that whisky had become of unusual value on account of the passing of an amendment to the Canada Temperance Act, by 10 Geo. V. ch. 8, prohibiting importation into the Province, and the day and hour fateful to all users of liquor was the 18th July, 1921, at midnight. That class of the community had become nervously apprehensive at the prospect of being without the stimulating beverages to which they were accustomed, and had become eager to stock their "private dwelling houses in which they reside" before the hour had struck.

Rossington, special service officer of the railway company (i.e. a detective) stationed at Fort Frances, says he telephoned to the plaintiff after the arrival of the consignment informing him that it had arrived intact and in good order. He kept special watch over the cases on the platform opposite the "sufferance warehouse" until they were handed over to the Customs officers, who had the keys of that warehouse, at 11 a.m., and in the noon-hour again telephoned the plaintiff as to what had

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been done with the cases and asked him when he could clear them from the Customs. The plaintiff in reply said that he could take the goods as soon as cleared; but, as there was a circus company performing in town, asked if it were necessary for him to take extra precaution in guarding the goods. Rossington, he says, told him not to mind about that, for he, Rossington, would look after it, as he had done in the case of other consignments. This conversation is not denied by Rossington, although there is a discrepancy between the two persons as to whether there were two telephone conversations or but the one at the noon-hour.

The railway company freight officials gave the plaintiff notice of the arrival by mailing the regulation post-card, dated and post-marked the 28th June, the day after.

In the morning of the 28th June, the Customs landing waiter, J. W. Prout, discovered that the sufferance warehouse had been opened, by the hasp being unscrewed and taken off, and that 76 cases out of the 100 had been stolen. No trace of these was found except that a case containing 11 empty straw wrappings and one full bottle in its wrapping was discovered a few hundred yards along the road from the station.

The point for decision in the case is whether the consignee or the railway company shall bear the loss of the 76 cases, and to assist this purpose it must be determined whether the railway company, at the time of the theft, was a common carrier or a warehouseman. I find that it was a carrier.

“Where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination, and given the consignee notice of arrival, and allowed the consignee a reasonable time in which to remove the goods. A reasonable time, however, must always be allowed for the removal. What that time is must depend on the circumstances of each case:” Halsbury’s Laws of England, vol. 4, p. 12 (Carriers).

The decisions in Ontario bear out this statement of the law. The plaintiff had not time or opportunity to take over the goods.

The standard bill of lading for railways formulated by the Board of Railway Commissioners for Canada provides thus (sec. 6): “Goods not removed by the party entitled to receive them within 48 hours, or in the case of bonded goods within 72 hours, after written notice has been sent or given, may be kept in a car, station, or warehouse of the carrier subject to a reasonable charge for storage and to the carrier’s responsibility

as warehouseman only," which means that before the expiry of those periods the railway company is to remain carrier unless circumstances intervene to change its character and responsibility. Here there was no written notice until the postcard of the 28th June, which contains some irony, because as a matter of fact the 76 cases had then been stolen. If there is strength in the contention that the oral telephone notice from the defendant company's detective on the day of arrival put the duty upon the plaintiff of at once removing the goods, a cogent answer is that the company must have known by experience that the goods could not be cleared at Fort Frances until they had been gauged, which would take the time consumed in sending a bottle to Port Arthur Customs House and its return from there; the amount of Customs duty depending on the liquor being above or below "the strength of proof."

If the company's character as common carrier existed at the time of the theft, the question of negligence is not germane to the inquiry as to whether it is to be held liable for the loss or not, because a common carrier "is in the nature of an insurer, and if he carries without any qualification of his liability, he becomes an insurer against all but fire, tempest, and the King's enemies, and he insures against thieves, and the frauds of his own servants:" *Brind v. Dale* (1837), 8 C. & P. 207, per Lord Abinger, at p. 211.

The railway company takes the position that it was a warehouseman. In a document called in railway language "Expense bill No. 1," it charged the plaintiff \$7.20 as storage on 100 cases from the 27th June to the 18th July, although upon this same expense bill it is noted and admitted that 76 cases had been stolen from the warehouse. As warehouseman for hire, upon the railway company is the onus of accounting for goods which it cannot return to the owner: *Pratt v. Waddington* (1911), 23 O.L.R. 178; *Carlisle v. Grand Trunk Railway Co.* (1912), 25 O.L.R. 372, at p. 379, 1 D.L.R. 130, at pp. 135, 136; by shewing circumstances which negative negligence on its part. I find that it has not satisfied this condition. The degree of care required of a warehouseman is that which a careful and vigilant man would exercise in the custody of his own goods of similar character: *Wyatt Paine on Bailments* (1901), p. 93.

In the statement of defence itself it is pleaded that the plaintiff well knew that the said shipment was about to arrive at Fort Frances, and that acts of theft were common in the case of goods of such class, and that the plaintiff should have for his own protection taken extra precautions to see that the same

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were guarded and looked after. If he had done so, his guard would have been an intruder. But, if extra guarding was incumbent upon the plaintiff, a citizen having few such transactions, the more would it be incumbent on the company—well aware of the many thefts—to take special precautions to prevent the stealing of whisky, which in many communities—and probably in Fort Frances—was scarcely realised to be a crime by those who were not wealthy enough to lay in large stocks for the dry years to follow; yet, although the consignment was specially guarded on the train which brought it, and although a special guard was put on the 24 cases which remained after the theft, on the night of the 27th June this precious freight was left in a bonded warehouse, where the locking arrangements were quite flimsy and inadequate, as is proved by the fact that the screws holding the hasp were removed in a few minutes, and the sliding door thus opened. If the hasp had been attached to a substantial staple driven in and clinched on the other side of the door, or had the hasp been fastened by bolts and nutted on the inside, there would have been something to say to negative negligence. Under sec. 18 of the regulations of the Customs Department, 1155B, all railway companies shall provide secure and commodious “sufferance warehouses,” in connection with their stations, for landing, storing, delivering, and forwarding bonded goods, and all such premises are to be made secure to the satisfaction of the collector or proper officer of Customs. But the railway company remains warehouseman; it is the railway company that collects the Customs duties and pays them over to the Department; it was the railway company that made the warehouse charges in the present instance; and its warehouse is not a warehouse merely for the purposes of the Customs Department, but a warehouse as between the warehouseman and the bailor, and that must be the test of security and safe custody.

It follows that as warehouseman (if it were such) the railway company would also be liable.

The facts in this case make it different from *Brown v. Dominion Express Co.* (1921), 51 O.L.R. 359, where the whisky stolen was “at owner’s risk.”

The plaintiff claims damages on the basis of what he had to pay for 76 cases at \$40 per case to replace what was stolen. There is authority for making, as in conversion, the standard of damages the value of the goods at the time of trial, and as in cases of breach of contract to supply: Halsbury’s Laws of England, vol. 10, p. 344 (Damages). He is entitled therefore to recover \$3,040 on that count.

As regards duty paid the Department of Customs, the ruling of the Commissioner of Customs was that the duty on 100 cases was \$1,922.12; the Commissioner's ruling was founded on regulation No. 1343B, sec. 14 (g): "If a deficiency be found in the quantity of goods remaining in warehouse when compared with the quantities originally warehoused . . . then in such case the duty on the quantity found deficient shall be paid to the Collector of Customs before the ex-warehousing of such remaining goods" (Order in council, 22nd May, 1900).

The proportion of the duty imputable to 76 cases is \$1,460.81. The plaintiff is entitled to add this sum as part of his damages. But he put in a claim for a refund of this amount, and the railway company is to be placed in his shoes as regards this claim. If it has been refunded, it is not to be added to the damages; if it has not been refunded, the railway company is entitled to an assignment of it.

The plaintiff will have his costs of action.

[An appeal by the defendant from the judgment of Mowat, J., was dismissed by the First Divisional Court of the Appellate Division on the 12th November, 1922, except as to damages, in respect to which a reference was directed. See 23 O.W.N. 245. The reasons for judgment will be reported in due course.]

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[APPELLATE DIVISION.]

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RE CANADIAN WESTERN STEEL CORPORATION LIMITED.

Feb. 15.

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May 23.

Bankruptcy—Incorporated Company—Assignment to Trustee under Bankruptcy Act—Order for Continuance of Proceedings under Winding-up Act—Delegation of Powers of Court to Official Referee—Ex Parte Order—Jurisdiction of Registrar in Bankruptcy—Bankruptcy Rule 13—Ultra Vires—Bankruptcy Act, sec. 2 (o) (10 & 11 Geo. V. ch. 34, sec. 2)—“Leave of the Court”—Mortgagee—Realisation of Security—Necessity for Leave under Winding-up Act—When Granted—Action in Foreign Court—Effect of Bankruptcy Act—Creation of Dominion Courts—Burden of Maintenance Thrown on Provinces—Administration of Justice in the Province—British North America Act, sec. 92 (14).

An incorporated company made an assignment to a trustee under the provisions of the Bankruptcy Act, but subsequently, by virtue of sec. 66 (2) and Bankruptcy Rule 13, an order was made by the Registrar in Bankruptcy, upon the *ex parte* application of the authorised trustee, directing that all further proceedings in the winding-up be continued under the provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and delegating to an Official Referee the powers of the Court for the winding-up of the company. Certain bonds, secured by a mortgage trust deed, were a first charge upon lands of the company in the Province of Alberta, and the trustee for the bondholders and an individual bondholder, desiring to proceed in Alberta for the realisation of their security, applied, under sec. 22 of the Winding-up Act, to the Official Referee for leave to do so. The Referee refused to grant leave, on the ground that under sec. 133 of the Winding-up Act the applicants could enforce their security in the winding-up proceedings:—

Held, by ORDE, J., upon appeal, that leave to bring an action should be granted almost as a matter of course to a mortgagee seeking to realise his security.

Re Brampton Gas Co. (1902), 4 O.L.R. 509, 518, followed.

Re J. McCarthy & Sons Co. of Prescott Limited (1916), 38 O.L.R. 3, 11, *Stewart v. LePage* (1916), 53 Can. S.C.R. 337, and *H. J. Carson & Co. v. Montreal Trust Co.* (1915), 49 N.S.L.R. 50, 23 D.L.R. 690, distinguished.

The ruling of the Referee should be reversed, and the applicants should have leave to institute in Alberta such an action for the enforcement of their security as they might be advised.

Upon appeal by the liquidator from the order of ORDE, J.:—

Held, by a Divisional Court of the Appellate Division, that the Registrar in Bankruptcy had no jurisdiction to make the order which he made, and that it was nugatory.

The effect of sec. 2 (o) of the Bankruptcy Act, as enacted by the amending Act of 1920, 10 & 11 Geo. V. ch. 34, sec. 2, is to provide that the Winding-up Act shall not, except by leave of the Court, extend or apply to proceedings instituted under it before or after the Bankruptcy Act came into force. What the Act authorises is the continuance of proceedings instituted under the Winding-up Act before or after the coming into force of the Bankruptcy Act, if the leave of the Court is obtained. The enactment does not contemplate taking proceedings under the Bankruptcy Act and then continuing them, if leave is obtained, under the Winding-up Act.

The rights of a mortgagee under the Bankruptcy Act differ from those which he has under the Winding-up Act. Under the former he may

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proceed regardless of the bankruptcy, while under the latter Act he cannot proceed unless by leave of the Court.

Bankruptcy Rule 13, which assumes that bankruptcy proceedings may go on under the Winding-up Act, although no proceedings have been instituted under it, is *ultra vires*.

Quære, whether the leave which the Act provides for can be granted on an *ex parte* application. The result of the giving of the leave may alter the rights of creditors and mortgagees, as well as others, for the provisions of the two Acts differ as to these rights, as do also the provisions as to preferences.

The effect of the Bankruptcy Act is to create Dominion Courts (sec. 63), and Parliament has assumed to make certain Provincial Courts, Courts of Bankruptcy, and to cast upon the Provinces the burden of maintaining these Dominion Courts. And the Act provides for the assignment by the Minister of Justice of Judges of the Provincial Courts for the exercise of the powers and jurisdiction in bankruptcy. This is an interference with what is by the British North America Act, sec. 92 (14), within the exclusive authority of the Provinces—the administration of justice in the Provinces.

Valin v. Langlois (1879), 5 App. Cas. 115, considered.

The appeal from the order of ORDE, J., was dismissed, and it was declared that the order of the Registrar in Bankruptcy was made without jurisdiction and was of no effect.

Per MAGEE, J.A.:—After a company has been put in bankruptcy, resort cannot be had to the Winding-up Act unless in pending cases. After the bankruptcy there is nothing upon which winding-up proceedings can take effect—the assets being vested in the trustee in bankruptcy. The order of ORDE, J., was unnecessary, but gave no right not existing, and the appeal from it should be dismissed.

Per FERGUSON, J.A.:—Suggestions for amendment of sec. 64, subsecs. 3 and 4, of the Bankruptcy Act.

AN appeal by John C. Hargrave and the Northern Trust Company from a certificate of Mr. J. A. C. Cameron, K.C., an Official Referee.

December 14, 1921. The appeal was heard by ORDE, J., in the Weekly Court, Toronto.

R. C. H. Cassels, K.C., for the appellants.

R. S. Robertson, K.C., for the liquidator of the corporation.

February 15, 1922. ORDE, J.:—The Canadian Western Steel Corporation Limited, on the 11th March, 1921, made an assignment to a trustee under the provisions of the Bankruptcy Act, but subsequently, by virtue of sec. 66 (2) and Bankruptcy Rule 13, an order was made that all further proceedings in the winding-up be continued under the provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144. There are outstanding and unpaid \$169,000 of the bonds of a company known as Canadian Western Steel Company Limited (not the corporation now being wound up), forming part of an authorised issue of \$500,000, which are secured by a mortgage trust deed to the Northern Trust Company as trustee, as a fixed specific first

charge upon certain freehold and leasehold lands of the company situate in the Province of Alberta, and upon all other present and future realty of the company, including its buildings, plant, equipment, machinery, and fixtures, as also by way of floating charge upon its undertaking, goodwill, chattels, book-debts, etc. Hargrave is the holder of \$33,000 of the bonds in question.

The steel company sold its assets to the Canadian Western Steel Corporation Limited (the corporation now being wound up), subject to the bonds, which the purchasing corporation covenanted to assume and pay.

There are arrears of interest upon the bonds, and by the terms of the bonds and the mortgage trust deed the payment of the principal was accelerated and became due in consequence of the bankruptcy.

Hargrave and the trustee for the bondholders, desiring to proceed in Alberta for the realisation of their security, applied to the Official Referee to whom the winding-up order delegated the winding-up, for leave. The Official Referee, as appears by his certificate of the 24th November, 1921, has refused such leave, on the ground that all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, etc., may, under sec. 133 of the Winding-up Act, be obtained by an order of the Court on summary petition and not by any action. From that ruling Hargrave and the trustee now appeal.

The arguments which were advanced by counsel for the liquidator were all based upon decisions rendered under the Winding-up Act, and before the coming into operation of the Bankruptcy Act. While the effect of the order made under Rule 13 of the Bankruptcy Act, that the proceedings are to continue under the Winding-up Act, is to bring into play all, or substantially all, of the provisions of the Winding-up Act, it must not be forgotten that, when the authorised assignment under the Bankruptcy Act was made, the bondholders and the trustee under the mortgage trust deed were entitled in some measure to proceed to realise their security without leave: sec. 6, subsec. 1, and sec. 10 of the Bankruptcy Act. The fact that the Bankruptcy Act expressly preserves to a secured creditor his ordinary remedies for the realisation of his security may be taken as indicating the mind of Parliament on this point, and as resolving in favour of the secured creditor any doubt, if there is any doubt under the authorities, as to whether leave ought to be granted to a secured creditor under sec. 22 of the Winding-up Act, or whether he should be restricted to the remedies afforded him by sec. 133 of that Act. I refer to this aspect of the matter

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because of the strenuous argument of Mr. Robertson that the modern tendency of the Court is to refuse leave and to restrict the creditor in such cases to the provisions of sec. 133.

The principle is well-settled that a secured creditor may proceed to realise his security independently of any bankruptcy or winding-up proceedings, and is not confined to the medium of the winding-up of the insolvent estate, in all cases where the security is of such a nature as to enable the creditor to realise without resort to the Court for the purpose, and that where the security is in the form of a mortgage, though leave to bring an action may in some cases be necessary, such leave is granted almost as a matter of course: *Re Brampton Gas Co.* (1902), 4 O.L.R. 509, at p. 518.

Counsel for the liquidator, however, contends that the more modern practice is "not to exclude from the winding-up workshop" cases in which formerly leave to proceed independently would have been granted—see per Meredith, C.J.C.P., in *Re J. McCarthy & Sons Co. of Prescott Limited* (1916), 38 O.L.R. 3, at p. 11, 32 D.L.R. 441, at p. 447. But in that case the creditor was not seeking to enforce a security, but was a simple contract creditor who desired to bring an action to establish a claim for a mere money demand. And the judgment itself distinguished the case from those involving the rights of mortgagees. Nor am I able to find anything in the cases of *Stewart v. LePage* (1916), 53 Can. S.C.R. 337, 29 D.L.R. 607, or *H. J. Carson & Co. v. Montreal Trust Co.* (1915), 49 N.S.L.R. 50, 23 D.L.R. 690, to justify the suggestion that the Court has departed from the principle that leave ought to be granted almost as of course to a mortgagee seeking to foreclose or otherwise realise upon his security. The Nova Scotia case did not involve the rights of a mortgagee at all. And in *Stewart v. LePage*, which merely decided that, where winding-up under the Dominion Act has commenced in one Province, proceedings must not be commenced in another Province without leave from the Court in the winding-up proceedings, there is the clear intimation that if the creditor is asserting a claim to the ownership of certain assets (and the security of a mortgagee is the same in principle) leave ought to be granted: Anglin, J., at p. 349.

In the present case the lands covered by the mortgage trust deed are situate in Alberta, and Hargrave, the bondholder who is applying with the trustee, resides in Alberta. The right to exercise all the ordinary remedies open to the bondholders and to the trustee ought not, in my judgment, to be lightly interfered with. If the purchaser of the bonds of a company secured

by a mortgage upon assets in one Province is to risk having his remedies cut down by reason of the winding-up of the company in some remote Province, the value of such securities may be very seriously impaired.

While the question of granting leave under sec. 22 is to some extent a matter of discretion, the Official Referee has, in my judgment, proceeded upon a wrong principle. He deals with the question as if it were a matter of jurisdiction, and, holding that, by virtue of sec. 133, he has jurisdiction under the Winding-up order to deal with the subject-matter of the bondholders' claims, he declines to grant leave. No one questions the jurisdiction of this Court to deal with the matter. That is not the point. The question is, whether or not, according to the established principles applicable to the rights of mortgagees and debenture-holders, leave to proceed by an action ought to be granted. I am clearly of opinion that such leave ought to be given.

The decision or ruling of the Official Referee will therefore be set aside, and an order will issue giving leave to the applicants to bring such action in the Province of Alberta for the enforcement of their securities as they may be advised.

The liquidator will pay the costs of this appeal to the applicants out of the assets of the estate in his hands.

The liquidator moved for an order granting leave to appeal from the order of ORDE, J., and extending the time for appealing.

The motion was heard by FERGUSON, J.A., in Chambers.

Robertson, K.C., for the liquidator.

Cassels, K.C., for the respondents.

February 27. FERGUSON, J.A.:—The Canadian Western Steel Corporation is in liquidation. The Northern Trust Company and one John C. Hargrave, a bondholder under a bond mortgage held by the trust company, applied to the Referee for leave to commence action to enforce the mortgage.

The Referee refused leave, being of opinion that the rights of the parties could be best dealt with in the Winding-up proceedings—see secs. 22 and 133 of the Winding-up Act.

On appeal, Mr. Justice Orde granted leave, being of opinion that the practice required such leave to be granted almost as a matter of course.

The applicants served notice of appeal; but, on applying to

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set the case down, found that sec. 101 of the Winding-up Act requires that leave to appeal be obtained. Hence this application.

Mr. Robertson contended that the discretionary order of the Referee was not appealable, or that, if appealable, it should not be interfered with unless it appeared that the Referee had proceeded upon a wrong principle—and that the authorities relied upon by Mr. Justice Orde did not establish that the Referee had proceeded on an erroneous idea of the practice.

He relied on *Re Brampton Gas Co.*, 4 O.L.R. 509; *Re J. McCarthy & Sons Co. of Prescott Limited*, 38 O.L.R. 3, 32 D.L.R. 441, and secs. 22 and 133 of the Winding-up Act.

Mr. Cassels contended that *Re Raven Lake Portland Cement Co.* (1911), 24 O.L.R. 286, and cases collected in Masten's Company Law, 2nd ed., p. 823, demonstrated that the practice as stated by Mr. Justice Orde was well-established.

I have read the opinions and authorities cited, and think the point raised is doubtful, and that leave to appeal should be allowed; the time for setting down being extended to the 13th March.

Costs of the application should be costs in the appeal.

March 29 and April 12. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Robertson, K.C., for the appellant.

Cassels, K.C., for the respondents.

The arguments are set out in the judgment of FERGUSON, J.A., *post*.

May 23, 1922. MEREDITH, C.J.O.:—This is an appeal, by the liquidator and trustee in bankruptcy of the Canadian Western Steel Corporation Limited, from an order of Orde, J., dated the 15th February, 1922, giving leave to the respondents, a bondholder and a mortgagee of the property of the company, as trustee for the bondholders, to proceed on the mortgage notwithstanding the proceedings which have been assumed to be taken under the Winding-up Act.

The company made an assignment under the Bankruptcy Act to the appellant, and a petition for the winding-up of the company under the Winding-up Act was filed, but no further proceedings were taken upon it.

On the 2nd April, 1921, the Registrar in Bankruptcy, on the *ex parte* application of the appellant, made an order directing that all further proceedings in the winding-up of the company be continued under the Winding-up Act, appointing the appel-

lant provisional liquidator of the company, and referring it to J. A. C. Cameron, Official Referee, to appoint a permanent liquidator and "to take all necessary proceedings for and in connection with the winding-up of the said company . . ."

It is further provided by the order that "all such powers as are conferred upon the Court by the said Winding-up Act and amending Acts as may be necessary for the said winding-up of the said company be and the same are hereby delegated to the said J. A. C. Cameron."

And the Referee is proceeding under the reference thus made to him.

The rights of a mortgagee under the Bankruptcy Act differ from those which he has under the Winding-up Act. Under the former he may proceed regardless of the bankruptcy, while under the latter Act he cannot proceed unless by leave of the Court, and one of the questions to be determined is, which of these Acts governs.

By sec. 2 (o) of the Bankruptcy Act, 9 & 10 Geo. V. ch. 36, the definition of the word "debtor" includes a corporation carrying on business in Canada, but there follows the provision to that effect, the following: "and where the debtor is a corporation, as defined by this section, the Winding-up Act, chapter 144 of the Revised Statutes of Canada, 1906, shall not extend or apply to it, notwithstanding anything in this Act contained, but all proceedings instituted under that Act before this Act comes into force may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made."

The effect of this legislation was to repeal the Winding-up Act except as to proceedings pending under it when the Bankruptcy Act came into force.

By (1920) 10 & 11 Geo. V. ch. 34, sec. 2, the provision I have quoted was repealed and re-enacted to read as follows: "and where the debtor is a corporation, as defined by this section, the Winding-up Act, chapter 144 of the Revised Statutes of Canada, 1906, shall not, *except by leave of the Court*, extend or apply to it notwithstanding anything in that Act contained, but all proceedings instituted under that Act before this Act comes into force *or afterwards, by leave of the Court*, may and shall be as lawfully and effectually continued under that Act as if the provisions of this paragraph had not been made."

I have, for convenience, italicised the words that were introduced by the amendment.

In order to understand the effect of this change, it is neces-

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sary to refer to other sections of the Bankruptcy Act.

By sec. 2 (1) "court" or "the court" is defined as "the court which is invested with original jurisdiction in bankruptcy under this Act."

By Rule 4 provision is made that "all matters and applications shall be heard and determined in Chambers unless the Court or a Judge shall in the particular matter or application otherwise direct."

By sec. 65 (2) of the original Act, the Registrar is, subject to General Rules limiting them, to have among other powers the power "to hear and determine any unopposed or *ex parte* application" (para. g).

By sec. 66 (2) it is provided that "such rules" (i.e., general rules) "shall not extend the jurisdiction of the Court, save and except that, for the purpose of enabling the provisions of Rules having application to corporations, but for such purpose only, the Winding-up Act, chapter 144 of the Revised Statutes of Canada, shall be deemed part of this Act."

In this Province the Court of original jurisdiction is the Supreme Court of Ontario, and it is constituted a Court of bankruptcy (sec. 63 (1)).

By sec. 63 (2) it is provided that, "subject to the provisions of this Act and to General Rules, the Judge of the Court exercising jurisdiction in bankruptcy or in authorised assignment proceedings may exercise in Chambers the whole or any part of his jurisdiction."

Rule 13 provides that, "where any proceedings in bankruptcy have been commenced against a corporation or where a corporation has made an authorised assignment, the Court may, on the application of the trustee or of any creditor or shareholder, grant leave that all further proceedings in the winding-up of the corporation or liquidation of its assets be continued under the Winding-up Act and amendments thereto, and may make such order for the transfer of proceedings or to effectuate such leave as to the Court shall seem best."

It is clear, I think, that the effect of the provisions of sec. 2 which I have quoted is not to empower the Court to dispense with taking proceedings under the Winding-up Act, or to authorise the Court in a bankruptcy proceeding to pronounce an order for the winding-up of the company, the appointment of a liquidator, or the delegation to an officer of the Supreme Court of the powers of the Court. What was done in this case, as I have said, was for the Registrar, on an *ex parte* application, to make an order embracing all these matters. That

neither he nor the Court acting in the bankruptcy proceedings had, in my opinion, jurisdiction to do. It is clear, I think, that all that is authorised by para. (o) of sec. 2 is, where proceedings have been instituted under the Winding-up Act, the continuance of them, if the leave of the Court is obtained; and, where proceedings have not been so begun, to authorise proceedings to be taken under the Winding-up Act, if the leave is obtained. The enactment does not appear to me to contemplate taking proceedings under the Bankruptcy Act and then continuing them, if the leave is obtained, under the Winding-up Act. All that is done, where proceedings have not been begun under the Winding-up Act before the Bankruptcy Act came into force, is to give persons entitled to take proceedings for the winding-up of a company the option, if leave is obtained, to proceed under the Winding-up Act. Where proceedings under the Winding-up Act were begun before the Bankruptcy Act came into force, it is made permissible to go on under the Winding-up Act, and in other cases, as I have said, the option is given to proceed under it—in other words, to take such steps as are necessary to obtain a winding-up order and to proceed with the winding-up under it.

What sec. 2 (o), as amended, provides, is that the Winding-up Act is not, except by leave of the Court, to extend or apply to proceedings instituted under it “before the Bankruptcy Act came into force,” or afterwards, that is, instituted under the Winding-up Act after the Bankruptcy Act came into force.

The result of the conclusion to which I have come is that the Registrar had no jurisdiction to make the order which he made and that it is therefore nugatory.

Rule 13 is, I think, *ultra vires*. It assumes that bankruptcy proceedings may go on under the Winding-up Act, although no proceedings have been instituted under it. What the Act authorises is the continuance of proceedings instituted under the Winding-up Act before or after the coming into force of the Bankruptcy Act, if the leave of the Court is obtained.

I doubt whether the leave which the Act provides for can be granted on an *ex parte* application. The result of the giving of the leave may alter the rights of creditors and mortgagees, as well as others, for the provisions of the two Acts differ as to these rights, as do also the provisions as to preferences.

It would indeed be an extraordinary result if, by the act of the Registrar, on an *ex parte* application, these rights can be changed, and equally so if the Registrar of the Bankruptcy Court can make an order for the winding-up, the appointment of a liquidator, and the delegation of the powers of the Court to

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a Referee, which in a winding-up proceeding can be made only by the Court, i.e., the Supreme Court of Ontario.

There are, in my opinion, some provisions of the Bankruptcy Act which require amendment, and some that are probably *ultra vires* the Dominion Parliament.

No good reasons exist, I think, for making the rights to which I have referred of one sort if proceedings are taken under the Winding-up Act and of another sort if they are taken under the Bankruptcy Act.

The effect of the Bankruptcy Act is to create Dominion Courts (sec. 63), and Parliament has assumed to make certain Provincial Courts Courts of Bankruptcy and to cast upon the Provinces the burden of maintaining these Dominion Courts at the expense of the Provinces, for it is the officers of the Provincial Courts, who are appointed and paid by the Provinces, upon whom, under the provisions of the Act, the obligation rests of performing duties under the Bankruptcy Act.

How can the imposition upon the Provinces of the burden of carrying on the work that is to be done under the Bankruptcy Act be justified?

It would, no doubt, have been competent for Parliament to have enacted a bankruptcy law and to have left the administration of it to the Provincial Courts, as is done in the case of the criminal law, but it is a very different thing to create a Bankruptcy Court and to cast upon the Provinces the duty of providing for the carrying on of the work of that Court by its Courts and at the expense of the Provinces.

Then the Act provides for the Minister of Justice assigning a Judge or Judges of the Provincial Courts for the exercise under his or their direction of the powers and jurisdiction in bankruptcy and otherwise conferred by the Act. Is this not an interference with what is by the British North America Act, sec. 92 (14), within the exclusive legislative authority of the Provinces—the administration of justice in the Provinces?

I have not overlooked the case of *Valin v. Langlois* (1879), 5 App. Cas. 115. In that case the question was as to the authority of Parliament to commit to the Provincial Courts jurisdiction with regard to election petitions. It is to be observed that what was dealt with was an application for leave to appeal to Her Majesty in Council from a judgment of the Supreme Court of Canada, and that in stating the opinion of the Judicial Committee Lord Selborne, p. 117, said that the Lords of the Committee very much doubted whether, “if there had been an appeal and counsel present on both sides, the grounds

on which an appeal would have been supported, or might have been supported, could have been better presented to their Lordships than they have been upon the present occasion by Mr. Benjamin.”

I mention this because it is probable that the Committee would not feel bound to follow the conclusion announced by Lord Selborne if in a subsequent case, after full argument, a different conclusion seemed preferable.

Reliance was placed by Lord Selborne on the fact that by sec. 41 of the British North America Act it is provided that the old mode of determining election petitions shall continue until the Parliament of Canada shall otherwise provide.

With great respect, I am unable to find in sec. 41 anything which warrants the conclusion that authority is conferred on the Parliament of Canada to impose on Provincial Courts and Judges the duties which the Election Court and its officers are to perform, if, as Lord Selborne thought, the Election Court were a Dominion Court. I do not question the right of Parliament to enact an election law and to leave the administration of it to Provincial Courts and Judges, but what I do question is its authority to create a Dominion Court and to man it with the Provincial Courts and Judges. As well might Parliament impose upon them the duties which are to be performed by the Exchequer Court of Canada.

For the reasons I have given, I would dismiss the appeal with costs, and in the order dismissing it I would embody a declaration that the order of the Registrar in Bankruptcy was made without jurisdiction and is of no effect.

MACLAREN and HODGINS, JJ.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A.:—Appeal by G. T. Clarkson, as liquidator of the Canadian Western Steel Corporation, from an order of Orde, J., allowing a bondholder of that company and the Northern Trust Company, the mortgagees in trust for the bondholders, to take proceedings in the Province of Alberta to enforce and realise their security.

The order is intended to be made under the Winding-up Act, R.S.C. 1906, ch. 144.

Before 1919, the Winding-up Act was in effect a bankruptcy Act as regarded insolvent companies, though applying to companies not insolvent; and, after a winding-up order, no action or proceeding against the company could be begun or proceeded with except by leave of the Court: secs. 22, 23.

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The Bankruptcy Act was passed in 1919, and in sec. 2 (o) declared that where the debtor was a corporation the Winding-up Act should not extend or apply to it, but proceedings instituted before the Bankruptcy Act might be continued under the Winding-up Act. In 1920, by 10 & 11 Geo. V. ch. 34, sec. 2, this section, 2 (o), was amended so as to provide that the Winding-up Act should not extend or apply to corporations except by leave of the Court, but all proceedings instituted under that Act before the Bankruptcy Act, or instituted afterwards by such leave, might be continued. The effect of this, as I read it, is that, if proceedings have been instituted (by leave if after 1920) under the Winding-up Act before bankruptcy proceedings, they may be continued under the Winding-up Act, but not that after the company has been put in bankruptcy resort may be had, either with or without leave, to the Winding-up Act or any of its provisions, whether intermittently or otherwise. In fact after the bankruptcy there is nothing upon which winding-up proceedings can take effect—the assets being vested in the trustee in bankruptcy. As the Winding-up Act was intended to apply also to companies not insolvent, it is manifest that it was proper that it should still be available; but the Bankruptcy Act did not restrain resort to it where the company is in fact bankrupt, though it may be questioned whether it was intended that leave should be given in the case of a bankrupt company. That question, however, is not material here. The order appealed from was, I think, unnecessary, but gave no right not existing, and the appeal should be dismissed.

I agree with my Lord the Chief Justice as to the order of the Registrar not being such as could be made by that officer.

FERGUSON, J.A.:—Appeal by the liquidator from an order of Orde, J., granting the mortgagees leave to commence an action in the Courts of Alberta to realise upon their security.

By sec. 63 of the Bankruptcy Act, jurisdiction in bankruptcy is conferred upon the Supreme Court of Ontario.

Section 64 directs (subsec. 3) that, except as otherwise provided, all the powers and jurisdiction of the Court in bankruptcy shall be exercised by a Judge named by the Minister of Justice, and (subsec. 4) that the registrars, clerks, and officers in bankruptcy shall be appointed by the Chief Justice of the Supreme Court of Ontario.

Section 65 defines the powers of registrars in bankruptcy as (2 (f)) “to make any order . . . which by any rule in that behalf is prescribed as proper to be made . . . in Chambers.”

and among other things gives them power (g) "to hear and determine any unopposed or *ex parte* application."

On the 11th March, 1921, the Canadian Western Steel Corporation Limited, having its head office in the city of Owen Sound, assigned to G. T. Clarkson, of Toronto, all its property for distribution among its creditors in pursuance of the said Bankruptcy Act.

On the same day, William Kennedy & Sons Limited, creditors of the Canadian Western Steel Corporation, filed, in the Central Office at Toronto, a petition to wind-up under the Winding-up Act, R.S.C. 1906, ch. 144.

There is no record of this petition having been presented to the Court or of a winding-up order having been made by a Judge of the Supreme Court; but, on an *ex parte* application of Mr. Clarkson, the trustee in bankruptcy, George S. Holmsted, Esquire, K.C., a Registrar in Bankruptcy, purporting to act under sec. 65 of the Bankruptcy Act and Rule 13, made the following order:—

"In the Supreme Court of Ontario.

"In Bankruptcy.

"George S. Holmsted, Esq., K.C., Registrar in Bankruptcy.

"In Chambers. Saturday the 2nd day of April, A.D. 1921.

"In the matter of the authorised assignment of Canadian Western Steel Corporation Limited, debtor.

"Upon the application of counsel for Geoffrey Teignmouth Clarkson, authorised trustee, upon reading the assignment for the general benefit of creditors made to the applicant under the Bankruptcy Act by the company above named, dated the 11th day of March, 1921, and the affidavit of the applicant, filed, and upon hearing what was alleged by counsel for the applicant:—

"1. It is ordered that all further proceedings in the winding-up of Canadian Western Steel Corporation Limited be continued under the Winding-up Act, being chapter 144 of the Revised Statutes of Canada and amending Acts.

"2. It is further ordered that Geoffrey Teignmouth Clarkson, the authorised trustee under the Bankruptcy Act, be and he is hereby appointed provisional liquidator of the estate and effects of the above named company, upon giving security to the satisfaction of J. A. C. Cameron, Esquire, for the due performance of his duties.

"3. It is further ordered that it be referred to the said J. A. C. Cameron to appoint a permanent liquidator or liquidators to the estate and effects of the said company above named and

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to take all necessary proceedings for and in connection with the winding-up of the said company and to fix the security to be given by the said liquidator upon his appointment and the remuneration to be paid to the said liquidator.

"4. And it is further ordered that, in pursuance and by virtue of the Bankruptcy Act and of the Winding-up Act, being chapter 144 of the Revised Statutes of Canada, and amending Acts, all such powers as are conferred upon the Court by the said Winding-up Act and amending Acts as may be necessary for the said winding-up of the said company be and the same are hereby delegated to the said J. A. C. Cameron.

"5. And it is further ordered that the costs of the applicant of this application and order be taxed and paid by the said permanent liquidator out of the assets of the said company which shall come into his hands."

The order made by Mr. Holmested was taken to Mr. Cameron, therein named, and was by him and all the parties interested treated as being an adjudication that the corporation should be wound up under the Winding-up Act, rather than under the Bankruptcy Act, and that the rights of all parties should be defined, fixed, and dealt with as is provided by the Winding-up Act, rather than by the Bankruptcy Act.

In November, 1921, John Campbell Hargrave, a bondholder of the Canadian Western Steel Company, under a mortgagee-deed dated the 1st May, 1916, made between the Canadian Western Steel Company Limited and the Northern Trust Company as trustee for the bondholders, and the Northern Trust Company as such mortgagee, applied to J. A. C. Cameron, named in the order of Registrar Holmested, for leave to commence, in the Courts of Alberta, proceedings to enforce payment of their bond-mortgage.

The learned Referee was of opinion that the leave applied for should not be granted, but that the applicants could and should enforce their rights in manner provided for by sec. 133 of the Winding-up Act, and refused the leave applied for.

The applicants appealed: on the appeal Mr. Justice Orde reversed the order of the Referee, and granted the leave applied for. This is an appeal by the liquidator from the order of Mr. Justice Orde.

The appellant contends that under the Winding-up Act no proceedings against the liquidator or the company can be instituted without leave of the Court; that the learned Referee was right in his opinion that he had, under sec. 133 of the Winding-up Act and the order of Registrar Holmested, power and jurisdiction to determine the rights of the applicants, and

could do so more expeditiously and with less expense than if leave to proceed in the Courts of Alberta were granted; that, the Referee having exercised his discretion in respect of the application for leave, Mr. Justice Orde should not have interfered; counsel also argued that Mr. Justice Orde in making his order was of opinion that the authorities established that the applicant was entitled as of right to the leave asked, and the learned Judge proceeded on an erroneous view of the authorities.

Counsel for the respondents relied on the reasons of Mr. Justice Orde for his order, and also contended that the rights of the parties were governed by the Bankruptcy Act rather than by the Winding-up Act, and pointed out that by sec. 6 of the Bankruptcy Act the right of a secured creditor to realise on his security is expressly preserved.

On these arguments and contentions it has become necessary to determine whether or not the proceedings for the liquidation and adjustment of the rights of the creditors and the insolvent corporation are to be determined by reference to the provisions of the Bankruptcy Act, or by reference to the provisions of the Winding-up Act, R.S.C. 1906, ch. 144; for, if they are to be determined and regulated by the Bankruptcy Act, the applicant mortgagees' rights to enforce their security appear to be absolute; while, if they are to be determined and regulated by the provisions of the Winding-up Act, it would appear that the mortgagees must proceed to enforce their claim in manner provided for by sec. 133 of the Winding-up Act unless the Court having jurisdiction under the Winding-up Act otherwise permits; that brings us to the consideration of the meaning and effect of several sections of the Bankruptcy Act.

For the appellant liquidator it was contended that sec. 2 (o) and secs. 63, 65, and 66 of the Bankruptcy Act and Rules 4 and 13 passed pursuant to the Bankruptcy Act, read together, empower the Registrar in bankruptcy, on an *ex parte* application by the trustee in bankruptcy, to make an order for winding-up under the Winding-up Act, and to delegate to an officer named by him the power of the Court in winding-up matters, and to direct him to wind up the company, and in doing so to exercise all the powers conferred on the Supreme Court by the Winding-up Act; and that such order has the effect of making applicable to the liquidation of this corporation, all the provisions of the Winding-up Act, to the exclusion of the provisions of the Bankruptcy Act. In support of these contentions the liquidator submitted that:—

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By the Act, sec. 63 (2), a Judge may exercise the whole or any part of his jurisdiction in *Chambers*.

By sec. 65 (2), the Registrar is empowered "to make any order or exercise any jurisdiction which by any Rule in that behalf is prescribed as proper to be made or exercised in *Chambers*."

By Rule 4, *all matters and applications* are to be heard and determined in *Chambers* unless the Court or a Judge shall in the particular matter or application otherwise direct.

Therefore the Registrar, except those matters expressly exempted from his jurisdiction by sec. 65, has power to adjudicate upon all matters in bankruptcy.

By sec. (2) (o), as amended by (1920) 10 & 11 Geo. V. ch. 34, sec. 2, the Winding-up Act is not (subject to certain exceptions) to apply to companies (see sec. 2 (k)), except by leave of the Court, i.e., in its bankruptcy period.

The Registrar, under the sections above referred to, has power to grant that leave. Where that leave is granted, then the Bankruptcy proceedings shall be *continued* under the Winding-up Act as if the provisions of (1920) 10 & 11 Geo. V. ch. 34, sec. 2, had not been made; which seems to mean, "as if there had been no statutory prohibition of the application of the Winding-up Act."

In other words, having obtained leave "to continue the proceedings" under the Winding-up Act, the proceedings thereafter cease to be in bankruptcy and are carried on under the ordinary jurisdiction of the Court. But where the word "continued" is used that seems to negative the idea that proceedings *de novo* must be commenced under the Winding-up Act. If that were so, then a petition would have to be filed and served and a case made for winding-up. This can hardly have been intended. The only way the proceedings can be "*continued*" is by in some way making the procedure of the Winding-up Act applicable to the case in hand; but, in order to make that procedure applicable, some order is obviously necessary, so that the order "to continue" may be effective.

Mr. Justice Orde was of the opinion that the power to order proceedings to "be continued" under the Winding-up Act necessarily involved the power to make any order necessary under the Winding-up Act to make that Act operative in the proceedings, such as the appointment of a liquidator, and the delegation of the powers of the Court to the Referee.

The Winding-up Act and the Bankruptcy Act being both legislative Acts of the Dominion Parliament, it was competent to that Parliament to say how those Acts are to be administered,

and, for the purpose of bankruptcy proceedings, to incorporate the Winding-up Act as a part of the Bankruptcy Act, or at all events make it part of the Bankruptcy procedure so far as it should see fit; and this it seems to have done by, in effect, enacting that the Winding-up Act is only to be operative as regards certain companies so far as the Court in its bankruptcy jurisdiction shall determine. It could hardly have been intended that the forum which is to determine whether the Winding-up Act is to be applicable should be competent only to make an ineffective order, dependent on another jurisdiction to determine whether or not it should have any operation at all. It is therefore submitted that the giving of power to the bankruptcy jurisdiction to determine whether or not the Winding-up Act should be applicable to a bankruptcy necessarily and implicitly involves the power also to make an order effectively to carry out its decision.

It may be remembered that, assuming that the Registrar in bankruptcy has the jurisdiction above suggested, he is very much in the position of the Master in Ordinary or Assistant Master when exercising jurisdiction under the Mechanics and Wage-Earners Lien Act; and, while their jurisdiction so to do may perhaps be open to question on constitutional grounds, the jurisdiction of the Registrar in bankruptcy, being derived from the Dominion legislature, seems free from any such objection.

I am of opinion that these contentions are not in accordance with the true intent and meaning of the Legislature as expressed in the sections referred to, and cannot be supported.

On my reading of these sections and Rules, a corporation to which the Bankruptcy Act is applicable must be wound up under, and the rights of the corporation and its creditors, directors and officers, must be ascertained and fixed by reference to, the provisions of the Bankruptcy Act, unless the Judge exercising jurisdiction in bankruptcy grants leave to continue proceedings already commenced under the Winding-up Act, or grants leave to institute and continue proceedings under the Winding-up Act.

It seems to follow that, in a case where proceedings under the Winding-up Act have not been commenced prior to an assignment in bankruptcy, or prior to proceedings in bankruptcy, and it is desirable that the liquidation be under the Winding-up Act rather than under the Bankruptcy Act, it is necessary: (a) to obtain leave from those having jurisdiction in bankruptcy to institute and continue proceedings under the Winding-up Act; (b) to institute proceedings under the Winding-

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up Act in the Court having jurisdiction under that Act, and in manner provided by that Act, and in those proceedings to obtain a winding-up order, and any delegation of powers the Court may deem wise to grant, and any orders and directions the Supreme Court may see fit to give to its own officials.

I am of opinion that the Bankruptcy Act does not empower the Judge in Bankruptcy or the Registrar in Bankruptcy, as such, to make orders under the Winding-up Act; or empower them as officers in Bankruptcy to interfere with, order, direct, or control officers of the Supreme Court of Ontario, but merely contemplates authorising them to interfere with, direct, control, order, or empower officers in the Bankruptcy Court, appointed to office in manner provided by the Act, and that it was not by the Act intended that the Judge in bankruptcy or the Registrar in bankruptcy should have authority to delegate to officers or to any other persons powers conferred on the Supreme Court of Ontario by some Act other than the Bankruptcy Act, and under which the Supreme Court may delegate its powers or some of its powers to its own officials.

The Bankruptcy Act (sec. 64) makes it plain that (except in special circumstances not here material) the jurisdiction and powers granted by that Act must be exercised, not by any Judge of the Supreme Court nor by any official of the Supreme Court, but by the Judge named by the Minister of Justice, and by officials in Bankruptcy named by the Chief Justice of Ontario. Mr. Cameron has not been appointed an officer or official in Bankruptcy, and it is worthy of note that the reference to him is not to him as an officer of any Court.

While *Valin v. Langlois*, 3 App. Cas. 115, is an authority for the proposition that the Parliament of Canada has power to commit to the Provincial Courts jurisdiction to administer laws of the Dominion in matters reserved to the exclusive jurisdiction of the Dominion, and to require them to do so, and, while there is much in the reasons for judgment to support the contention that the Dominion Parliament may require the Provincial Court and its officials to exercise the jurisdiction conferred, I doubt that it has yet been determined that the Dominion in such matters may legislate as to matters of procedure or may clothe some one who may or may not be an officer of the Provincial Court, such as the Registrar in Bankruptcy, with power and authority to order, direct, and control officers of the Provincial Court, or, by delegation of the Provincial Court's jurisdiction, to clothe him or them with powers conferred upon the Court itself.

If it were intended that such power should be exercised, it should, it seems to me, be made very plain and not left in doubt, and if left in doubt should not be inferred, for such outside interference and control must lead to trouble in the Courts and confusion and delay in the administration of justice.

I am also of opinion that the power to grant leave to proceed under the Winding-up Act, rather than under the Bankruptcy Act, is one that may in its use seriously and materially alter and affect the rights and remedies of all concerned in the liquidation of a corporation, and is one that should be exercised by the Court rather than the Registrar, and on notice to parties to be or who may be affected, and is one that should not be exercised *ex parte*.

I am, for these reasons, of opinion that the order of the Registrar of the 2nd April was made without authority, and has no legal validity, and that therefore the rights of the respondents to enforce their security, as preserved by sec. 6 of the Bankruptcy Act, have not been taken away but stand unimpaired.

I would dismiss the appeal, leaving the trustee in bankruptcy or the creditors, Wm. Kennedy & Sons, who have filed a petition to wind up, if so advised, to apply for leave to institute or continue proceedings, and if leave is granted to apply for a winding-up order.

I would not award costs to either party here or below.

I am of opinion that it would facilitate the administration of the Act if the administration thereof was left to the Court generally, and so that the Court might direct, order, or empower its officials generally, rather than that the jurisdiction of the Court should be exercised only by a Judge named by some power outside the Court, and only by officials appointed for that purpose and paid differently and in a way not contemplated by the Province when they were employed and when their duties were defined. For these reasons, I suggest that subsec. 3 of sec. 64 be amended to read about as follows:—

“Except as otherwise provided by this Act, all the powers and jurisdiction in bankruptcy and otherwise conferred by this Act may be exercised by any one of the Judges of the Court upon which such powers are conferred; that the judgment, decision, or order of a Judge shall be deemed the judgment, decision, or order of the Court; and references in the Act to the Court shall, where necessary, apply to the Judge so exercising the powers and jurisdiction of the Court, without thereby abrogating, restricting, or limiting the rights, powers, and duty

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of any and every Judge of the Court to exercise jurisdiction in bankruptcy; and the Minister of Justice shall from time to time assign to one Judge named by him the duty and obligation of devoting himself and so much of his time as may be necessary to performing the work of the Court in bankruptcy matters.''

And that subsec. 4 of sec. 64 be amended by providing that the fees by this Act made payable to a Registrar, or other officer in bankruptcy, shall, where such Registrar or officer is an officer of a Provincial Court, be paid to the Province in which the work is performed, by the purchase of law-stamps of the Province and the cancellation thereof by the officer of the Provincial Court.

Appeal dismissed.

[See the amendments made by the Bankruptcy Act Amendment Act, 1922, 12 & 13 Geo. V. ch. 8, to secs. 2 (o), 63 (1) and (3), 64 (3) and (5), 67, of the original Act.]

 [IN BANKRUPTCY.]

1922.
 Feb. 16.

RE HARRISON.

Bankruptcy—Authorised Assignment to Trustee—Subsequent Seizure of Goods upon Land of Insolvent for Arrears of Taxes against Land—Right of Municipality—Assessment Act, sec. 109, subsec. 1, para. 4—Transfer or Assignment from Owner—Protection of sec. 51 (6) of Bankruptcy Act—Marshalling of Securities as between Mortgagee of Land and Municipality—Goods Returned to Possession of Trustee—Direction to Trustee to Sell Goods and Pay Taxes.

After an authorised assignment by an insolvent to a trustee under the Bankruptcy Act, a municipal corporation seized, upon the land of the insolvent, certain chattels which had belonged to the insolvent, for arrears of taxes against the said land; but, pursuant to an order made in the bankruptcy proceedings, these chattels were returned to the possession of the trustee, without prejudice to any claim of the corporation to be paid out of the proceeds of the sale of the chattels by the trustee:—

Held, that the chattels were subject to seizure by the municipality, even in the hands of the trustee, because his title was derived by a transfer or assignment (whether statutory or voluntary was immaterial) from the owner, within the meaning of para. 4 of subsec. 1 of sec. 109 of the Assessment Act, and consequently within the protection afforded to claims for taxes by subsec. 6 of sec. 51 of the Bankruptcy Act.

Re F. E. West & Co. (1921), 50 O.L.R. 631, distinguished.

Upon the application of a mortgagee of the land, an order was made, in the bankruptcy proceedings, directing the trustee to sell sufficient of the goods to pay the taxes, costs, and expenses of the municipality, and to pay the same.

On the principle of marshalling, the mortgagee was entitled, as

against the insolvent estate, if the municipality exacted the taxes from the land, to the benefit of the other security.

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HENRY F. HARRISON, the insolvent, who carried on a hotel business at Oakville, made an assignment to an authorised trustee under the Bankruptcy Act, on the 16th August, 1921. A day or two later, the Municipal Corporation of the Town of Oakville seized certain goods and chattels of the insolvent, at Oakville, for arrears of taxes, amounting to \$1,482.22, against the lands of the insolvent; but, pursuant to an order of the Registrar in Bankruptcy, these goods were returned to the possession of the trustee, without prejudice to any claim of the corporation of the town to be paid out of the proceeds of the sale of the goods by the trustee.

William S. Davis held a first mortgage on the lands of the insolvent, upon which there was alleged to be due for principal and interest a sum exceeding \$25,000, and was taking steps to realise under his power of sale.

The arrears of taxes being of course a lien upon the lands ranking ahead of his mortgage, and to this extent impairing his security, Davis applied for an order declaring that the town corporation was entitled to levy upon the goods of the insolvent in the hands of the trustee and to be paid out of the proceeds, and directing the trustee to sell the goods and pay the arrears of taxes.

December 29, 1921. The motion was heard by ORDE, J., in Chambers.

J. M. Ferguson, K. C., for the applicant.

H. H. Donald, for the trustee.

J. M. Godfrey, K.C., for the town corporation.

February 16, 1922. ORDE, J. (after stating the facts as above):—Under sec. 109, subsec. 1, of the Assessment Act, R.S.O. 1914, ch. 195, the municipality has a lien (para. 1) upon the goods of the owner or tenant of the lands in respect of which the taxes are payable, wherever found within the county in which the municipality lies, and likewise (para. 4) upon goods upon the lands where title is claimed by purchase, gift, transfer, or assignment from the person taxed.

The trustee contends that these words are not sufficient to cover the case of a transfer of title operating by virtue of a receiving order or an authorised assignment. With this view I cannot agree. If the goods are still on the land which is charged with the payment of the taxes, then they are subject to

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seizure even in the hands of the trustee, because his title is derived by a transfer or assignment (whether statutory or voluntary is immaterial) from the owner, within the meaning of para. 4 of subsec. 1 of sec. 109 of the Assessment Act, and consequently are within the protection afforded to claims for taxes by subsec. 6* of sec. 51 of the Bankruptcy Act.

There is no conflict between this view and that already expressed in *Re F. E. West & Co.* (1921), 50 O.L.R. 631, 62 D.L.R. 207, as to business taxes. There I held that subsec. 11 (added in 1917 by 7 Geo. V. ch. 45, sec. 10) of sec. 109 of the Assessment Act was not wide enough to cover the case of assignments or receiving orders under the Bankruptcy Act so as to give to the purely personal claim for business taxes any privilege under subsec. 6 of sec. 51 of the Bankruptcy Act. But in the case of taxes charged upon the lands, the wording of subsec. 1 of sec. 109 is quite different, and is, in my judgment, sufficiently wide to preserve the privilege even after the bankruptcy.

Though the municipality was represented upon the motion, it is not asking for the order. The application is by the mortgagee. This, in my judgment, is immaterial. It is simply a case for marshalling. The municipality has two funds or securities to which it can resort for payment of the taxes, and the mortgagee has but one. Under these circumstances, he is entitled, as against the insolvent estate, if the municipality exacts the taxes from the lands, to the benefit of the other security. The town corporation's right to assert its claim was preserved by the Registrar's order, and that must enure for the benefit of the mortgagee as well.

There will, therefore, be an order directing the trustee to sell sufficient of the goods to pay the taxes, costs of seizure, and such other costs as are payable to the municipality, and to pay the same.

The costs of the mortgagee and of the town corporation and of the trustee upon this motion will be paid out of the insolvent estate.

* (6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

[IN BANKRUPTCY.]

1922.

RE MANCHESTER STORES LIMITED.

Feb. 16.

Bankruptcy—Insolvent Company—Unpaid Subscriptions for Shares—Motion by Trustee for Judgments against Subscribers as Contributories—Bankruptcy Act, sec. 36—Bankruptcy Rules 122 et seq.—Agreement to Pay for Shares by Supplying Goods—Purchase of Goods not a Condition Precedent—Allotment and Notice—Waiver—Attending Meetings of Shareholders—Subscription by Employee of Company—Dismissal from Employment—Collateral Agreement—Absence of Formal Allotment and Notice—Acceptance of Notice of Meetings—Failure to Repudiate.

Upon motion by the trustee in bankruptcy of the estate of an insolvent joint stock company for judgments, under sec. 36 of the Bankruptcy Act and Bankruptcy Rules 122 *et seq.*, against certain persons alleged to be liable as contributories in respect of their subscriptions for shares in the company:—

Held, that the members of a partnership who had subscribed for 10 shares of \$100 each, and with whom there was an agreement that the company would purchase goods from them and “allow the first \$1000 of goods taken to be applied on the stock,” were not relieved from payment by reason of goods not having been purchased to the full amount: the purchase was not a condition precedent to the subscription—the application of moneys owing for goods purchased upon the price of the shares was merely a method of paying the price.

If there was no allotment of the shares and no notice of allotment, a member of the partnership who attended a meeting of shareholders and acted as a shareholder must be deemed to have thereby waived the necessity for an allotment, and it was too late to repudiate.

(2) T. subscribed for 10 shares and paid half the price in two instalments. He was employed by the company for a short time, with an understanding that his salary would enable him to pay for his shares; he was discharged after he had made the second payment. He asserted that his subscription was conditional upon his employment:—

Held, that the agreement to employ T. was collateral to his subscription for the shares, and he could not escape liability as a contributory.

(3) In the case of C., who had subscribed for two shares, there was no evidence that any shares were allotted to him or notice of allotment given; but he received notices of three meetings of shareholders, and, although he did not attend, he never repudiated or withdrew his subscription:—

Held, that he must be taken to have accepted the notices as sufficient intimation that his subscription had been accepted and that he had become a shareholder, and he could not now escape liability. *Traders Trust Co. v. Goodman* (1917), 37 D.L.R. 31, and *Alberta Rolling Mills Co. v. Christie* (1919), 58 Can. S.C.R. 208, 214, followed.

MOTION by the trustee of the bankrupt estate of the above named company for judgments against certain persons named as contributories for the amounts unpaid upon their subscriptions for shares.

November 12, 1921. The motion was heard by ORDE, J., in Chambers.

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R. S. Cassels, K. C., for the trustee.

H. S. White, K.C., for R. M. Fraser, J. A. Fraser, and Mary A. Fraser, and for C. M. Taylor.

A. G. Cook, in person.

February 16, 1922. ORDE, J.:—The insolvent company made an authorised assignment under the Bankruptcy Act. The company was incorporated by letters patent under the Ontario Companies Act, on the 5th January, 1921, with an authorised capital of \$200,000. The trustee alleges that certain persons are liable as contributories in respect of their subscriptions for shares in the company, and now moves, after due demand made, for judgment under the provisions of sec. 36 of the Bankruptcy Act and Bankruptcy Rules 122 *et seq.* Upon the hearing of the motion certain evidence was given *vivâ voce*. I deal with the cases *seriatim*.

The Frasers' Case.

The three Frasers are members of a partnership known as the Fraser Hardware Company, of Galt. They subscribed for 10 shares of \$100 each, and allege that there was an agreement with the insolvent company whereby this stock was to be paid for by the purchase of goods of the Fraser Hardware Company. Goods were, in fact, purchased to the extent of \$417.53, and credit given, but the bankruptcy intervened before any more purchases were made.

Mr. White relied upon *Re Canadian McVicker Engine Co.* (1909), 13 O.W.R. 916, and contended that the purchase of the goods was a condition precedent to the subscription. But I cannot see the present agreement in that light. There was no condition precedent here at all. There was merely an agreement that the company would purchase hardware supplies from the Frasers, and, as Mr. J. A. Fraser put it, they were "to allow the first \$1,000 of goods taken to be applied on the stock." The application in this way of the moneys owing for goods purchased was merely a method of paying the subscription.

It was suggested, though not very seriously, that there had been no allotment of the stock and no notice of allotment. Mr. Fraser attended a meeting of shareholders and acted as a shareholder, and must be deemed to have waived the necessity for an allotment, and it is too late now to repudiate.

There will, therefore, be judgment against R. M. Fraser, J. A. Fraser, and Mary A. Fraser, trading as the Fraser Hardware Company, for \$648.06 and the proportionate costs of this application.

Taylor's Case.

Campbell M. Taylor subscribed for 10 cumulative preferred shares of \$100 each, paying \$250 in cash. He subsequently paid a further \$250. He was employed by the company at no stated salary, but says he was to receive a small salary at first and than a larger one to enable him to pay for his shares. Some time after his second payment, he had some disagreement with the manager and was discharged. He thereupon attempted to cancel his subscription. He now asserts that his subscription was conditional upon his employment. This defence cannot stand. The arrangement is in substance the same as that in the *Fraser's* case. The two agreements are collateral. Taylor may have a claim for damages for wrongful dismissal, but he cannot escape his liability as a contributory.

There will be judgment against him for \$500 and the proportionate costs of this application.

Cook's Case.

A. G. Cook subscribed for two shares. He swears that he never received any notice of allotment, and there is no evidence that any shares were ever allotted to him or notice of allotment given. He admits that he received notice of three meetings of shareholders, but says he never attended any meeting or did anything to admit his liability as a shareholder, and no evidence is given to the contrary. He says he always intended to pay on allotment, but he never repudiated or withdrew his subscription.

The question whether or not there has been such action on the part of the company as to constitute an allotment, or on the part of the shareholder as to waive the necessity for formal allotment and notice, is largely one of fact. It has been held by the Court of Appeal in Manitoba that the receipt of notice of a meeting of shareholders by a subscriber is notice of acceptance of his subscription: *Traders Trust Co. v. Goodman* (1917), 37 D.L.R. 31; and Anglin, J., in *Alberta Rolling Mills Co. v. Christie* (1919), 58 Can. S.C.R. 208, at p. 214, appears to approve of this principle. Mr. Cook received three notices and took no steps to repudiate or withdraw his subscription. I think he must be held to have accepted the notices as sufficient intimation that his subscription had been accepted and that he had become a shareholder, and that he cannot now escape his liability as such.

There will, therefore, be judgment against Cook for \$200 and the proportionate costs of the application.

Orde, J.

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[IN BANKRUPTCY.]

Feb. 17.

RE THOMAS.

Bankruptcy—Petition for Receiving Order—Petitioners without Status as Creditors—Subsequent Amendment—Date of Presentation of Petition—Date of Amendment—Payments of Money and Transfers of Goods by Debtor Attacked as Fraudulent—Bankruptcy Act, sec. 31—Payment Made more than three Months before Amendment—Transactions within three Months—Evidence—Onus—Act of Bankruptcy — Knowledge of Creditor — Summary Hearing upon Affidavits—Rehearing upon Oral Evidence.

At the date upon which a petition for a receiving order was presented, the petitioners had no status as creditors; the application for the order was enlarged to enable them to amend by adding or substituting other creditors as petitioners; and, about two months later, the petition was amended, the application renewed, and a receiving order granted: *Re Thomas* (1921), 50 O.L.R. 324 328:—

Held, that, the defect in the petition being fundamental, the date of presentation must be deemed to be the date when the petition was so amended as to constitute a sufficient foundation for the making of the receiving order.

After the making of the receiving order, the trustee applied, under Bankruptcy Rule 120, for an order or judgment setting aside as fraudulent and void certain payments of money and transfers of goods made by the debtor to his brother, a creditor. The application was heard in Chambers, the evidence consisting of affidavits:—

Held, that the earliest payment, made more than three months before the date of the amendment of the petition, must be excluded from the category of *prima facie* preferential transactions; but the remaining transactions, being within three months before that date, all came within the category; and the burden of establishing their validity and of shewing that the transactions took place without knowledge on the part of the creditor of the insolvent condition of the debtor, was cast upon the creditor by sec. 31 of the Bankruptcy Act, and that burden, upon the evidence (the affidavits), the creditor had not satisfied.

The payment made more than three months before the amendment did not fall within sec. 31 at all. The burden of establishing that this payment ought to be set aside was upon the trustee, and he had failed to shew any ground upon which that could be done.

The same result was reached after a re-trial upon oral evidence before another Judge.

MOTION by the trustee in bankruptcy of the estate of Ralph Thomas, under Bankruptcy Rule 120, for an order setting aside as fraudulent and void certain payments of money and transfers of goods made by the debtor, Ralph Thomas, to his brother John F. Thomas.

November 3 and 12, 1921. The motion was heard by ORDE, J., in Chambers.

D. G. M. Galbraith, for the trustee.

J. R. Robinson, for John F. Thomas.

February 17, 1922. ORDE, J.:—The evidence was submitted in the form of affidavits.

The petition for a receiving order was made by certain wholesale dealers in Montreal, and was presented on the 25th February, 1921. The status of the petitioning creditors was questioned, and the motion was enlarged to permit the petitioners to amend by adding or substituting other creditors: *Re Thomas* (1921), 50 O.L.R. 324. Subsequently the motion was renewed, some of the discounted bills having been taken up by the petitioners, a certain bank, as the holder of certain other bills, having been added as a petitioner, and the petition having been amended on the 22nd April, 1921. A receiving order was made on the 4th June, 1921: *Re Thomas* (1921), 50 O.L.R. 324, 328. I mention these proceedings because the date when the petition was amended is material on this motion.

When the petition was presented, the petitioners had no status; they were not then creditors of the alleged bankrupt, having discounted with certain banks the negotiable instruments theretofore held by them. Counsel for the trustee argues that the subsequent amendments whereby this defect was cured related back to the date of presentation of the original petition in its original form, and he cites certain English cases upon what is there termed the "relation back of the trustee's title." This relation back operates, by virtue of sec. 37 of the English Act of 1914, to carry the bankruptcy back to the act of bankruptcy, or, if more than one, the first act of bankruptcy, within a period of three months, committed by the bankrupt. This has in England a very important bearing upon all transactions with the bankrupt subsequent to the first act of bankruptcy. But these provisions of the English Act have not been re-enacted here. Their place is filled, to some extent at any rate, by those provisions of our Act dealing with fraudulent preferences, etc. I am unable to see in what way the English authorities upon the relation back of the trustee's title affect the question as to when the bankruptcy petition must be deemed to have been presented, within the meaning of sec. 31* of our Bankruptcy Act. I am of the opinion that where the defect in the petition

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* 31. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors or which has the effect of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking,

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is fundamental, as it was in this case, the date of presentation must be held to be the date when the petition was so amended as to constitute a sufficient foundation for the making of the receiving order. That date was the 22nd April, 1921.

John F. Thomas is a brother of the bankrupt, and was carrying on business as a dry goods merchant at Timmins, where the bankrupt also carried on a similar business. Prior to the 1st December, 1920, John F. Thomas had made advances of money and goods to the bankrupt to the extent of \$2,278.89. On the 8th December, 1920, the bankrupt paid him \$600, and on the 18th February, 1921, delivered him goods to the value of \$300. This was followed by further payments of money and one further delivery of goods until a final payment on the 13th April, 1921, made up an amount of \$2,279.19, a few cents in excess of the amount due to John F. Thomas. Four of the later payments of money were to take up promissory notes given by the bankrupt to his brother, the earliest of them having been given on the 29th January, 1921. All these payments and deliveries of goods are attacked by the trustee on the ground that they were made within three months prior to the presentation of the petition and are in consequence *primâ facie* preferential and void under sec. 31.

Holding, as I do, that the petition must be deemed to have been presented at the date of its amendment on the 22nd April, 1921, the earliest payment of \$600 made on the 8th December, 1920, is excluded from the category of *primâ facie* preferential transactions, but the remaining transactions, being subsequent to the 22nd January, 1921, all come within it. The burden is therefore upon the creditor to establish the validity of the transactions. This he attempts to do by swearing that he needed the money and had pressed for payment, and that he did not know or suspect that his brother had committed any act of bankruptcy or that bankruptcy proceedings had been commenced against him, and that the transactions were all in good faith and in their ordinary course of dealing as business men in the town of Timmins.

The act of bankruptcy upon which the receiving order was paying or suffering the same, if made, incurred, taken, paid or suffered with such view as aforesaid, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorised assignment, or if it has such effect as aforesaid be presumed *primâ facie* to have been made with a view of giving such a creditor a preferenc over the other creditors, whether it was made voluntarily or under pressure, and if held to have been made with such a view, be deemed fraudulent and void as aforesaid.

made was the giving of a chattel mortgage on the 27th January, 1921, to another creditor, which I held to be preferential (50 O.L.R. 324, 328). It is rather significant that two of the promissory notes, each for \$350, given by the bankrupt to his brother, were given on the 29th January, 1921. It is also significant that after that date the bankrupt, though still purchasing goods quite heavily, paid to his creditors only \$2,598.37, of which \$1,679.19 was to his brother.

The burden of establishing that the transactions subsequent to the 22nd January, 1921, were made without knowledge of the insolvent condition of the debtor is cast upon the creditor by sec. 31. I do not consider that a bald statement in an affidavit that he was not aware of any act of bankruptcy is sufficient. It is not altogether satisfactory to have to deal with questions of fact in a summary way upon affidavits, but the transfer of goods in satisfaction of a debt is always open to suspicion, and I think requires much more explicit evidence to support it than in the case of an alleged preferential payment of money. It is noteworthy here that the first transaction after the 22nd January, 1921, apart from the giving of the promissory notes, was that of the 18th February, 1921, when goods to the value of \$300 are transferred by the bankrupt. Without explanation that transaction is convincing that the creditor must then have become aware of the debtor's insolvent condition, and this knowledge would taint all the later transactions.

The payment of \$600 on the 8th December, 1920, having been made more than three months prior to the presentation of the petition, does not fall within sec. 31 at all. If it is subject to attack by the trustee, it must be because of some other statutory provision. The burden of establishing that the payment is subject to be set aside is upon the trustee, and he has failed to shew any ground upon which I can give him any such relief.

The trustee is therefore entitled to a judgment against John F. Thomas, declaring that the payments and deliveries of goods to him subsequent to the 22nd January, 1921, were fraudulent and void and must be set aside, and for the payment by John F. Thomas to the trustee of \$1,679.19 in respect thereof, together with the costs of this motion.

John F. Thomas appealed from the judgment of ORDE, J.

April 10. The appeal came on for hearing before MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

H. H. Davis, for the appellant.

Galbraith, for the trustee, respondent.

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THE COURT, by consent of the parties, discharged the judgment appealed against and remitted the case to the Judge in Bankruptcy for trial upon oral evidence; costs of the appeal to be costs in the proceeding.

Oral evidence was taken before FISHER, J.; and (May 29, 1922) he pronounced judgment in favour of the trustee, against John F. Thomas, for \$1,679.19, with costs of this and the summary trial before ORDE, J. (see 22 O.W.N. 397).

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[APPELLATE DIVISION.]

Feb. 18.
Oct. 10.

BRISCOE v. MOLSONS BANK.

Bankruptcy—Payments Made to Bank by Insolvent Debtor before Authorised Assignment—Fraudulent Preference—Notice of Available Act of Bankruptcy—Bankruptcy Act, sec. 2 (h)—Amendment by 11 & 12 Geo. V. ch. 17, sec. 3—"In Good Faith"—Secs. 31 and 32 (1) (d)—Payments Made after Assignment—Sec. 32 (1) (i)—Bonds Delivered before Assignment and Sold afterwards—Treatment of, as Cash on Day of Delivery.

The trustee in bankruptcy of the estate of H., under an authorised assignment, sought to recover from the defendants payments made by H., when insolvent, to the defendants, as fraudulent and void. The payments, with two exceptions, were made by H., when in a hopeless state of insolvency, for the one purpose of preferring his creditors; the defendants, so that his guarantors to the defendants might be as far as possible relieved from their obligations; and the defendants, when the moneys were paid to them, knew that. The payments were made within a few days of H.'s voluntary assignment to the trustee—indeed some were made after the assignment:—

Held, that the defendants had not, at the times of payment, notice of any "available act of bankruptcy" committed by H.; the transactions were all before the amendment to sec. 2 (h) of the Bankruptcy Act, by the Bankruptcy Act Amendment Act, 1921, 11 & 12 Geo. V. ch. 17, sec. 3.

Held, however, that the payments were not made "in good faith."

Both parties must be implicated in the want of good faith which invalidates a transaction.

Discussion of the construction and application of secs. 31 and 32 of the Bankruptcy Act.

Some actual present consideration having been given for some parts of the payments, the plaintiff could not recover the whole payments—the value given must be deducted: sec. 32 (1) (d).

Payments credited to H. in the defendants' books after the date of the assignment (see sec. 32 (1), condition (i)) were the proceeds of sales by the defendants of bonds given to them by H. before the date of the assignment, the proceeds not being recovered and credited until after that date. The bonds were intended to be treated as cash, and the fact that they had to be sold before the exact amount of the payment could be known and credited did not pre-

vent the transaction being treated as a "payment" at the time when the bonds were delivered.

AN issue arising out of bankruptcy proceedings and sent for trial by order of the Court.

February 14. The issue was tried by MEREDITH, C.J.C.P., without a jury, at Chatham.

S. B. Arnold and *A. L. Hanna*, for the plaintiff.

J. C. Elliott, K.C., for the defendants.

O. L. Lewis, K.C., for Haining and others, third parties.

February 18. MEREDITH, C.J.C.P.:—The question involved in this issue is: whether certain payments, or any of them, made by the bankrupt to the defendants in the issue, are "fraudulent and void as against the trustee" in bankruptcy of the bankrupt's estate.

Section 31 of the Bankruptcy Act provides, among other things, that every payment made by any insolvent person in favour of any creditor with a view to giving such creditor a preference over other creditors, or which has the effect of giving such creditor a preference over the other creditors, shall, if the person paying the same make an authorised assignment within three months after the date of paying, if made with such view as aforesaid, be deemed fraudulent and void as against the trustee. The enactment then goes on to provide for the case of payment, etc., which has the effect of giving such a preference, creating a *primâ facie* presumption only that such payment, etc., was made, etc., with a view to giving the creditor a preference over other creditors.

All that seems plain enough, but Parliament did not deem it sufficient, and added another section—32—in which, subject to some provisions of the Act not applicable to this case, it is provided that nothing in the Act shall invalidate any payment by the bankrupt to any of his creditors, provided that certain conditions are complied with, one of which is: that the payment "is in good faith" and takes place before the date of the receiving order or authorised assignment; and the other is: that the person (other than the debtor) to whom the payment is made has not at the time of the payment notice of any available act of bankruptcy committed by the bankrupt or assignor.

This somewhat roundabout way of expression does not at all dim the meaning of the enactment in its effect upon this case: there are just two questions involved in it, either of which, being answered in the plaintiff's favour, concludes the case against the defendants upon the main point involved in it.

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The questions are: (1) Were the payments in question payments made in good faith before the date of the assignment to the plaintiff? and (2) Had the defendants, at the times of payment, notice of any available act of bankruptcy committed by the bankrupt?

As I deem that the second question must be answered in favour of the defendants, I shall consider it first.

At the time of all these transactions, an available act of bankruptcy was: "an act of bankruptcy available for a bankruptcy petition at the date of the presentation of a petition on which a receiving order is made:" sec. 2 (*h*) of the Act. How can that be applicable to this case, which is one of an authorised assignment only? The amendment to the Act in this respect was made after all these transactions: The Bankruptcy Act Amendment Act, 1921, 11 & 12 Geo. V. ch. 17, sec. 3.

The act of bankruptcy alleged relates to a writ of execution in a sheriff's hands; I do not consider whether or not an act of bankruptcy has been proved in respect of it, because that is unnecessary; as I am unable to find that the defendants had notice of it. It is strange that they had not, if in very truth they had not; but I am unable, in view of the positive denial of their manager in the witness-box, to find that they had, whichever way the onus of proof may lie. And I may add that, no matter upon whom the onus of proof may be, if the very truth can be discovered, as it may be in this case, the judgment should be based upon the very truth of the matter.

On the whole evidence, I cannot but find in favour of the plaintiff on the first question.

However it might seem under sec. 31 alone, it is tolerably plain—though not nearly as plain as it might and should have been made—that both parties must be implicated in the want of good faith which invalidates a transaction.

It is not needful, either, to consider what "good faith" is, because the facts of this case prove the want of it, whatever reasonable, definite meaning may be given to the words "good faith."

The payments in question, with two exceptions, were made by the bankrupt, when in a hopeless state of insolvency, for the one purpose of preferring his creditors, the defendants, so that his guarantors to them might be relieved from their obligations, under their guaranties held by the defendants, as much as possible; and the defendants, when the moneys were paid to them, knew that.

The bankrupt was so insolvent that the trustee's estimation is that his estate shall pay only about 10 cents in the dollar;

for about two months a writ of execution lay in the sheriff's hands against him in full force and virtue, binding all his property; and all the payments in question were made within a few days of his voluntary assignment in bankruptcy: indeed it is contended and is actually a fact that some were made after it.

The defendants' manager knew that judgment had been entered up against his debtor in the sum of over \$4,000 at the suit of a competing bank; he learned then that his customer had gone to and was dealing with the other bank without having informed him and without his knowledge; he knew that that judgment had been reported by the mercantile agencies; and that thereby the debtor's credit should be ruined, and that his creditors should come down upon him "like a thousand of bricks;" and he had had a conversation with the debtor's book-keeper, who had gone to see him with a view to "all getting together to pull Haining out of the hole," and he knew that she, on finding how much the indebtedness to the bank was, had given up the effort "to pull Haining out of the hole," as hopeless. On that occasion they discussed the Standard Bank affair, and the defendants' manager seemed to know all about it. He was of course complaisant, knowing that the defendants were fully secured and that all payments really should enure to the debtor's relative, connection, and friend, who were his guarantors to the defendants.

Therefore, generally, the plaintiff succeeds; but there are some minor points yet to be considered: some actual present consideration was given for some parts of the payments in question; the plaintiff cannot recover the whole payments, the value so given must be deducted: sec. 32 (1) (d). This affects two items.

For the plaintiff it was contended: that the four payments credited to the bankrupt in the defendants' books on and after the date of the assignment should go to the plaintiff under any circumstances, not having been made before the date of the assignment: sec. 32 subsec. (1), condition (i).

These amounts were the proceeds of sales by the defendants of Victory bonds given to them by the bankrupt before the date of the assignment, the proceeds of which were not received and credited until after that date. But I find that the bonds were intended to be treated as cash, and the fact that they had to be sold before the exact amount of the payment could be known and credited did not, under or for the purposes of the Act, prevent the transaction being then and now treated as a "payment" at the time when the bonds were delivered as and for that purpose.

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It, however, is further evidence of the intention to feather the nest of the guarantors with all kinds of material that could be made available for that purpose.

The parties can, no doubt, readily calculate and agree upon the amount that the plaintiff should recover from the defendants, and should do so; but, if they will not, the local registrar should ascertain and state it, in the presence of or after notice to the parties; and in that case the matter is to be mentioned to me again, otherwise it need not.

The guarantors of the defendants are parties to the issue and joined with the defendants in resisting the plaintiff's claim, and so are bound by this judgment; but no other judgment or order affecting them can rightly be made here; it is nothing like a case for indemnity or contribution; the defendants can recover against them only on their guaranties, and any such action is quite foreign to these bankruptcy proceedings.

The defendants must pay the plaintiff's costs.

The defendants and the third parties appealed from the judgment of MEREDITH, C.J.C.P.

October 9 and 10. The appeals were heard by MULOCK, C.J.Ex., MASTEN, ROSE, and ORDE, JJ.

Elliott, K.C., for the defendants, appellants.

Lewis, K.C., for the third parties, appellants.

A. G. Slaght, K.C. and *Hanna*, for the plaintiff, respondent.

THE COURT, at the conclusion of the argument, dismissed the appeals with costs.

MULOCK, C.J.Ex.:—There is ample evidence in support of the finding of the learned trial Judge of fraudulent preference; and, therefore, the appeals fail. It is unnecessary to interpret the meaning of sec. 32 of the Bankruptcy Act.

MASTEN, J.:—I agree, but desire to add that, in my opinion, sec. 31 of the Bankruptcy Act is independent of sec. 32, and must be construed separately.

ROSE, J.:—I agree. This case falls under sec. 31, not under sec. 32. The trial Judge was not bound to find, on the evidence, that the intent to defraud was disproved.

ORDE, J.:—I agree. This case comes under sec. 31, and the burden was on the defendants to rebut the presumption mentioned in that section; and that, upon the evidence, the defendants had not done.

Appeals dismissed with costs.

[IN BANKRUPTCY.]

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RE CECILIAN CO. LIMITED.

Feb. 20.
June 12.

Bankruptcy—Claim of Municipal Corporation to Priority for Business Taxes over Ordinary Debts—Assessment Act, sec. 109—Bankruptcy Act, secs. 11, 51—"Assignee for the Benefit of Creditors."

A municipal corporation is not entitled, by virtue of subsec. 6 of sec. 51 of the Bankruptcy Act, to priority, in the distribution of a bankrupt's estate, over other creditors of the bankrupt, for business taxes in respect of which no distress has been made (ROSE, J., dissenting). The provisions of sec. 109 of the Assessment Act and secs. 11 and 51 of the Bankruptcy Act, considered.

"Assignee for the benefit of creditors," in sec. 109, subsec. 11 (added by 7 Geo. V. ch. 45, sec. 10), means an assignee for the benefit of creditors under the Ontario Assignments and Preferences Act. *Re F. E. West & Co.* (1921), 50 O.L.R. 631, approved.

MOTION by the Corporation of the City of Toronto by way of appeal from the disallowance, by the trustee of the bankrupt estate of the above named company, of the claim of the city corporation to be allowed priority over other creditors of the debtor-company, in respect of business taxes.

January 3. The motion was heard by ORDE, J., in Chambers.
J. A. R. Mason, for the city corporation.
T. H. Barton, for the trustee in bankruptcy.

February 20. ORDE, J.:—The company made an assignment under the Bankruptcy Act on the 15th August, 1921. At that time there was due by it to the Corporation of the City of Toronto for business taxes for the year 1921, based upon the 1920 assessment, the sum of \$1,111.09, and the city corporation claims under the levy of 1922, based on the 1921 assessment, the further sum for business taxes of \$1,511.09. The city corporation claims to be entitled, by virtue of subsec. 6 of sec. 51, to priority over the other creditors for these taxes.

The main question here was disposed of by me in *Re F. E. West & Co.* (1921), 50 O.L.R. 631, 62 D.L.R. 207, 2 Can. Bkey. R. 3. In that case the city corporation appealed to the Appellate Division from my judgment; but I understand that, upon it appearing that the amount of the estate there was not sufficient to satisfy the prior claims of the Crown in full, leaving nothing for the city, even if its contention was correct, the Appellate Division declined to deal with what, under the circumstances, was merely an academic question. (See 50 O.L.R. at p. 644.) The city corporation, quite properly, desires to test the soundness of my decision, and the present case will readily serve that

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purpose. I understand that in several other estates the same question has arisen, and it is desirable that the point should be carried to a higher Court.

It was suggested on the hearing of the motion in the present case that the argument on the city's claim in the *West* case had not been sufficiently adequate, having been overshadowed by what was then considered the more important question as to the Crown's prerogative, and that if the matter were fully argued before me I might consider that my previous decision was erroneous. The question was therefore reargued before me as fully as the parties desired, but very little more, if anything, was urged than in the *West* case.

My interpretation of the application of subsec. 6 of sec. 51 is sufficiently disclosed in the *West* case. That Parliament intended to preserve to the Crown and to municipalities those priorities in the payment of taxes which were already given to them by law or by statute, is clear. The simple question here is, whether the existing provincial legislation governing the collection by municipalities of business taxes, which are a purely personal obligation upon the part of the ratepayer, and are not charged upon his lands or his goods, is wide enough to come within the scope of subsec. 6 of sec. 51 of the Bankruptcy Act.

There is nothing in sec. 109 of the Assessment Act, R.S.O. 1914, ch. 195, as it stood prior to 1917, which, in my judgment, had that effect. But the city corporation contends that subsec. 11 of sec. 109, as added by 7 Geo. V. ch. 45, sec. 10, is sufficient. Had that added subsection used language wide enough to cover the case of proceedings in bankruptcy under a federal Bankruptcy Act, I think it would then have come within the language and spirit of subsec. 6 of sec. 51, as being a "law . . . of the Province . . . in which the debtor resides," and that the priority so given would not be dependent upon any charge or lien, but would have its effect by virtue of the combined operation of subsec. 6 of sec. 51 and of the provincial legislation.

I am still unable to bring my mind to the conclusion that the expression "any assignee for the benefit of creditors" in subsec. 11 of sec. 109 means, or was intended to mean, anything else than an assignee for the benefit of creditors, as that expression was understood in 1917 when the amendment was passed, that is, an assignee for the benefit of creditors under the Ontario Assignments and Preferences Act. It is true that under the Bankruptcy Act, when an authorised assignment is made, the authorised assignee is an assignee for the benefit of creditors, but he is so by virtue of an Act having for one of its objects the

ultimate discharge of the bankrupt, and with powers and duties and subject to obligations in many respects wholly differing from those of an assignee under the Ontario Act. In fact, while there are many points of resemblance between the two cases, there are as many points of difference, and it is simply because of the use in the two Acts of the same phrase to describe entirely different things that the difficulty arises here.

If the city's contention is admitted, what is to be done in the case of a receiving order, where the trustee acquires his title against the will of the bankrupt? Is he to be deemed an "assignee for the benefit of creditors" within the meaning of subsec. 11 of sec. 109? It is impossible so to extend the meaning of the words in subsec. 11 without straining them unduly; but, if this is not done, then there would be this anomaly, that under an assignment the municipality would have a privileged claim, whereas under a receiving order there would be no such privilege, though in all other respects, so far as I am aware, there is no distinction, in their effect upon the distribution of an insolvent estate, between a receiving order and a voluntary assignment.

The case, in my judgment, is simply one which has not been anticipated by the existing legislation. The omission ought to be corrected by an appropriate amendment to the Assessment Act.

For these reasons, I can see no ground for altering the views expressed in the *West* case, and I must therefore hold that the city has no claim to priority.

Some question was raised as to the liability of the insolvent estate for business taxes for 1922, the assignment having been made on the 15th August, 1921. The city relies on subsec. 3 of sec. 95 of the Assessment Act, as passed in 1917 by 7 Geo. V. ch. 45, sec. 9, to support its claim. This amendment seems wide enough to make the company liable to be assessed even after the bankruptcy, if the assessment roll had been revised prior thereto. This question was not argued as fully as perhaps it deserved.

Strictly speaking, the claim must be regarded, I think, as a contingent one, within the meaning of subsec. 3 of sec. 44 of the Bankruptcy Act, and consequently requiring valuation under Bankruptcy Rule 119. The valuation may, however, be dispensed with if the rate for 1922 is fixed before the distribution; otherwise the provisions of Rule 119 must be followed. My order can be so framed as to cover this.

The costs of this motion ought to be paid by the city.

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The city corporation appealed from the judgment of ORDE, J.

March 24. The appeal was heard by MULOCK, C.J.Ex., KELLY, MASTEN, and ROSE, JJ.

C. M. Colquhoun, for the appellants.

C. B. Henderson, for the trustee in bankruptcy, respondent.

June 12. MULOCK, C.J.Ex.:—This is an appeal by the Corporation of the City of Toronto from an order of Orde, J., declaring that the corporation is not entitled to any priority in respect of its claim for business assessment taxes owing by the company. There is no dispute as to the facts, which are as follows:—

The company was carrying on business in the city of Toronto, and on the 15th August, 1921, made an assignment under the Bankruptcy Act. At that time it owed the corporation for business taxes arising from its assessment in 1920 the sum of \$1,111.09, which amount was then overdue, but for which no levy had been made; the company was also then liable to the corporation in a further sum for business tax assessment in 1921; and for these two sums the corporation filed a claim in bankruptcy against the estate, claiming to be entitled to payment thereof prior to payment of unsecured debts. The authorised trustee disallowed the claim for priority, and from such disallowance the corporation appealed to Orde, J., who dismissed the appeal, and this appeal is from his order.

Subsection 4 of sec. 51 of the Bankruptcy Act declares that, "subject to the provisions of this Act, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*." What provision to the contrary is there in this Act? It was contended that, under subsec. 6 of sec. 51, claims for taxes are not of the class of debts which are paid *pari passu*, but are entitled to priority of payment. That subsection is as follows: "Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws."

I am of opinion that this subsection does not determine where claims for taxes are to rank on the assets of the estate, but that it merely provides that they are not to be prejudicially affected by the assignment in bankruptcy, and that they may be realised

in accordance with any law of the Dominion or Province, etc. It was suggested that when on an assignment the estate of the debtor passed to the authorised trustee there remained no assets which would be exigible under the warrant of the corporation's collector for taxes, and that therefore if the subsection preserved any right to the creditor it would be a barren one. But is this so?

Subsection 2 of sec. 109 of the Assessment Act declares that "in case of taxes which are not a lien on land remaining unpaid . . . the collector . . . may . . . levy the same with costs by distress . . . (4) upon goods and chattels which at the time of making the assessment were the property and on the premises of the person taxed in respect of business assessment and at the time for collection of taxes are still on the same premises, notwithstanding that such goods are no longer the property of the person taxed."

Under the combined effect of subsec. 6 of sec. 51 of the Bankruptcy Act and of subsec. 2 of sec. 109 of the Assessment Act, the corporation is entitled, notwithstanding the assignment in bankruptcy, to distrain for business taxes just as it could have done had there been no assignment; in other words, subsec. 6 does not interfere with the collection of such taxes or prejudice the corporation's lien on the particular goods and chattels exigible under the collector's warrant, nor does it enlarge the corporation's rights by giving it a priority on the general fund of the estate. As regards such fund the corporation remains an unsecured creditor and must rank *pari passu* with other creditors.

Thus construed, full effect may be given to subsec. 4 and subsec. 6 of sec. 51, neither qualifying the other.

It was contended that sec. 11 of the Bankruptcy Act (as enacted by sec. 6 of the amending Act of 1921, 10 & 11 Geo. V. ch. 34) prevents a municipal corporation levying a distress for taxes, and reliance was placed upon the words in this section that the assignment takes "precedence over . . . (b) all other attachments, executions or other process against property," etc.; but the section does not declare such attachments, executions, or other process to be void, nor that a municipal corporation may not exercise the right of distress given to it by subsec. 2 of sec. 109 of the Assessment Act, which right has been preserved by subsec. 6 of sec. 51 of the Bankruptcy Act; to have so declared would have been in conflict with subsec. 6. That subsection was, I think, clearly intended to preserve to municipal corporations their liens in respect of taxes and their right to collect the same in accordance with the provisions of

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any Dominion or provincial laws; and it is fair to assume that sec. 11 was not intended to neutralise the effect of subsec. 6.

For these reasons, I am of the opinion that the appeal fails and should be dismissed with costs.

KELLY, J.:—The contest here is whether the city is entitled to receive in priority certain taxes on business assessment of the Cecilian Company Limited, which made an assignment under the Bankruptcy Act, on the 15th August, 1921.

Mr. Justice Orde, on an application to him, decided against the city's claim to priority, and the appeal is from that decision.

The question has arisen from a consideration: (1) of the provisions of the Assessment Act, R.S.O. 1914, ch. 195, and particularly subsec. 11 of sec. 109, which was added by 7 Geo. V. ch. 45, sec. 10; and (2) of sec. 51 of the Bankruptcy Act, particularly subsec. 6.

Subsection 11 of sec. 109 says: "Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment, or has been seized by the sheriff or by a bailiff of any court, or is claimed by or in possession of any assignee for the benefit of creditors or liquidator, it shall be sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator, notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator shall pay the amount of the same to the collector in preference and priority to any other, and all other fees, charges, liens or claims whatsoever."

It is admitted that at the time of the assignment no seizure or attachment had been made for these taxes. I agree with Mr. Justice Orde's conclusion that the expression "any assignee for the benefit of creditors," in the above subsec. 11, does not mean and was not intended to mean anything else than an assignee for the benefit of creditors, as that expression was understood in 1917, when the amendment was passed; that is, an assignee for the benefit of creditors under the Ontario Assignments and Preferences Act.

Assuming that interpretation to be correct, notice by the tax collector to the assignee in bankruptcy of the amount due for taxes is not effective to authorise payment to the tax collector as a preferential claim.

Then as to sec. 51 of the Bankruptcy Act, which deals specially with priority of claims in the distribution of the property of the bankrupt or authorised assignor. In its earlier subsections it states in the order of their priority certain preference payments, and declares, by subsec. 4, that: "Subject to

the provisions of this Act, all debts proved in bankruptcy or under an assignment shall be paid *pari passu*;" and by subsec. 5 it provides for the disposal of any remaining surplus. [The learned Judge then set out subsec. 6, as above.]

The question is not an easy one or altogether free from doubt. I have had the advantage of considering the judgments of the other members of this Court, and, in my opinion, sufficient reasons are set forth by his Lordship the Chief Justice and my brother Masten for declaring against the preference contended for by the appellant without ignoring the meaning and effect which may be given to subsec. 6, when read with other statutory provisions relating to the collection of taxes and to liens and charges intended to secure payment thereof. I adopt their conclusion because I think that, by the process of reasoning they have followed, these various subsections of sec. 51 can be harmonised one with the other and with other statutory provisions relating to the subject without bringing about that interference to which subsec. 6 refers, or cutting down the effect of any part of the whole section; and because, if full effect were given to the appellant's contention, it is easily conceivable that cases might, and probably would, arise where the preferences declared by subsec. 1, or some of them, would fail; a result which, it is fair to assume, was not intended by the legislators who framed the Act.

MASTEN, J.:—The facts and the statutes relevant to the disposition of this appeal are set out in the judgment now in appeal and in the reasons of my Lord the Chief Justice and of my brother Rose, both of which I have had an opportunity of perusing.

Section 51 of the Bankruptcy Act is intituled "Priority of Claims," and proceeds in subsec. 1 to designate three classes of claims which are to be entitled to priority in the distribution of the estate, but taxes, rates and assessments are not included in these three preferential classes. Subsection 4 provides that, "Subject to the provisions of *this Act*, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*." [The learned Judge then set out subsec. 6, as above.]

If it was intended by sec. 51 to create a priority in favour of taxes, it would seem that taxes would have been specifically mentioned in subsec. 1 along with the three other preferential classes, and its order of priority in relation to the other three classes would be specified. Not only so, but the question arises—assuming that subsec. 6 gives taxes a preference—is it superior or inferior to the fees and expenses of the trustee mentioned in

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subsec. 1 (firstly), to the costs mentioned in subsec. 1 (secondly), and to wages spoken of in subsec. 1 (thirdly)? These considerations lead me to the conclusion entertained by my Lord the Chief Justice that sec. 51 does not "interfere" in one way or the other with the collection of taxes, but leaves the right of the municipality in the same situation as if that section had not been passed; it neither prejudices nor aids the collection of taxes; it simply does not "interfere."

If this is the correct interpretation of sec. 51, it becomes necessary to inquire, in the next place, what are the rights of the municipal corporation apart from sec. 51? Has the corporation, in the circumstances here existing and apart from sec. 51, a preferential right?

For the reasons assigned by Orde, J., and by my brother Rose, I agree with the judgment appealed from, that sec. 10 of the Assessment Amendment Act, 1917 (Ontario), has no application where the estate of an insolvent is in administration under an authorised assignment. The Assessment Act, R.S.O. 1914, ch. 195, makes the taxes due upon any land a lien on the land (sec. 94); and makes all taxes a debt recoverable by action (sec. 95); but the only special or superior right accorded to a municipal corporation in respect of taxes which are not a lien on land is found in sec. 109, subsec. 2, which gives to the municipal corporation a right of distress against the goods of the debtor. But, by sec. 11 of the Bankruptcy Act, that right of distress is superseded when an authorised assignment is made. That section is (in part) as follows: "Every receiving order and every authorised assignment made in pursuance of this Act shall take precedence over . . . (b) all other attachments, executions or other process against property, except such thereof as have been completely executed by payment to the execution or other creditor . . . and except also the rights of a secured creditor under section 6 of this Act." (These last words are added by the amending Act of 1921, 11 & 12 Geo. V. ch. 17, sec. 10.) Counsel for the appellant admits that, no distress having been levied prior to the execution of an authorised assignment, the appellant has no lien or charge on any property of the insolvent.

My conclusions are:—

First, that, quite apart from the special provision of subsec. 4 of sec. 51 of the Bankruptcy Act, the authorised assignee is bound to distribute the estate in his hands ratably among ordinary creditors, subject only to such priorities as are specifically given by the Act to certain classes of claims.

Second, that, by sec. 11 and in the manner indicated above,

the appellant is deprived of the only means by which it can secure a priority for taxes that are not a lien on land.

Third, that subsec. 6 of sec. 51 of the Bankruptcy Act does not operate to nullify the effect of sec. 11; and the result is that in respect of the taxes here in question the municipal corporation is an ordinary creditor of the estate without any special lien or priority.

I ought to add that, on the interpretation which I am suggesting, subsec. 6 is not nugatory, but has full effect in respect to taxes which are a lien on land, and probably in respect of taxes payable to the Crown.

For these reasons, I am of opinion that this appeal should be dismissed with costs.

ROSE, J. (after stating the nature of the appeal):—I share Mr. Justice Orde's view upon what he treats as the only question in the case (and what seems to have been the only question discussed before him), viz., the question whether the combined effect of subsec. 11 of sec. 109 of the Assessment Act, R.S.O. 1914, ch. 105 (as added by 7 Geo. V. ch. 45, sec. 10), and subsec. 6 of sec. 51 of the Bankruptcy Act, 9 & 10 Geo. V. ch. 36 (Dom.), is to give to the municipality the preference claimed. I think, as he does, that the "assignee for the benefit of creditors" referred to in the Ontario statute is such an assignee for the benefit of creditors as was known to the law at the time when the Ontario statute was passed, and not an authorised trustee under the Bankruptcy Act, and, therefore, that there is no statutory warrant for the adoption in bankruptcy of the procedure which would be followed in the case of an assignment for the benefit of creditors under the Ontario Act. Whether the result contended for would have followed if the Ontario statute had expressly been made applicable to an authorised trustee under the Bankruptcy Act—as Orde, J., appears to think it would—it is unnecessary to consider.

I agree also with the opinion expressed by Orde, J., in *Re F. E. West & Co.*, 50 O.L.R. 631, 62 D.L.R. 207, 2 Can. Bkey. R. 3, that after the property has become vested in the authorised trustee under the Bankruptcy Act the municipality cannot dis-train for taxes. Moreover, sec. 11 of the Bankruptcy Act, as amended by 10 & 11 Geo. V. ch. 34, sec. 6, gives to every receiving order and to every authorised assignment made in pursuance of the Act precedence over attachments, executions, or other process against property, even if they were in force at the time of the receiving order or assignment, unless they have

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been completely executed by payment to the execution or other creditor.

Subsection 6 of sec. 51 of the Bankruptcy Act has, however, in my opinion, the effect of producing, in a way not discussed by Mr. Justice Orde, the result for which the appellant corporation contends. Section 51 settles the order in which the various claims against the estate shall be paid by the authorised trustee. The trustee is to pay first, his own fees and expenses; secondly, the costs of the execution creditor, etc., provided for by sec. 11; and, thirdly, certain wages, etc. Subject to the provisions of the Act, he is to pay *pari passu* all debts proved; if there is a surplus, he is to apply it in payment of interest. Now, taxes payable by or imposed upon the debtor are debts; and, if there was nothing in sec. 51 but what has been mentioned, such taxes, if proved, would have to be paid *pari passu* with the other debts proved. But subsec. 6 enacts that nothing in sec. 51 (i. e., *inter alia*, no direction to the authorised trustee to pay debts *pari passu*) shall interfere with the collection of any taxes payable by the debtor under any law of the Province wherein the debtor resides; that is to say, that no direction for the payment of debts *pari passu* shall interfere with the collection of such taxes. The tax upon the business assessment which is in issue in this case is a tax imposed upon the debtor by the law of the Province in which he resides; there is, apparently, a deficiency of assets for the payment in full of all the debts, including such tax; any distribution of the assets *pari passu* amongst the creditors, including the municipality, must therefore interfere to some extent with the collection of the tax; and, if effect is to be given to the enactment that nothing in sec. 51 shall interfere, the authorised trustee must, as it seems to me, pay the tax in full before he proceeds to pay *pari passu* the other debts proved. The direction in subsec. 4 of sec. 51 for the payment of debts *pari passu* is not in terms absolute. It is expressly made subject to the provisions of the Act. One of such provisions is the provision in subsec. 6 that nothing in sec. 51 shall interfere with the collection of such taxes as are here in question. Parliament can hardly be supposed to have imagined that there was anything in subsecs. 1 to 5, inclusive, of sec. 51 which could interfere with the collection of such taxes *pari passu* with the other debts. Subsection 6, therefore, is not to be read as meaning merely that nothing in sec. 51 shall interfere with such collection *pari passu*; it must mean something other than that, and the only meaning that can be given to it is its literal meaning, viz., that nothing in sec. 51

shall interfere at all with the collection of such taxes, i. e., that such taxes may be collected notwithstanding the enactment that debts shall be paid *pari passu*. To read the two subsections together in the way I suggest is to give full effect to each. In no other way that has been suggested can both be made effective.

For these reasons, I would allow the appeal and would substitute for the declaration contained in para. 2 of the order appealed from a declaration that the city is entitled to the priority claimed. Upon the argument of the appeal nothing was said as to the question, shortly discussed by Mr. Justice Orde, as to whether the estate is liable in respect of the taxes for 1922, or only in respect of those for 1921, and I assume that there is no objection to para. 3 of the order, which prescribes the method of ascertaining the amount of the 1922 taxes.

The appellant should have costs here and below.

Appeal dismissed with costs (ROSE, J., dissenting).

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APPENDIX.

Ontario cases decided on appeal to the Supreme Court of Canada and reported since the publication of vol. 50 of the Ontario Law Reports:—

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